Popularizing Ballot Access: The Front Door to Election Reform

MARK R. BROWN*

Campaign finance reform and term limits are in vogue today, but both have serious constitutional wrinkles. A fairly easy pill to swallow, and one that ought to have a moderate term limit effect, is reducing ballot access requirements. Many states today charge candidates thousands of dollars to have their names placed on primary ballots. Others require that candidates collect thousands of signatures. Conventional wisdom has it that these restrictions are necessary to "winnow" the ballots by screening out frivolous candidates. In this Article, using empirical data gathered from the 1994 and 1996 congressional elections, Professor Brown shows that these restrictions do not have the intended effect: charging thousands of dollars in fees or requiring thousands of supportive signatures does not deter frivolous candidates from running for office.

This Article urges Congress to pass uniform ballot access requirements for congressional elections. States should be allowed some room to fashion their own requirements, but should not be allowed to exceed specific fee or signature limits. Professor Brown argues that the benefits of these measures would be many, including greater voter turnout, increased political competition, enhanced governmental accountability, and a more egalitarian electoral process. Ballots will remain manageable and voters will make informed choices. Meanwhile, only states' pocketbooks will suffer. And that, according to Professor Brown, is the price of free elections.

All quarters today agree that America's political image needs polish. Voter turnout is low across the United States, money is king, and influence peddling runs rampant. The problem is how to fix it. Two immediate solutions have taken center stage: first, campaign finance reform,[1] and second, legislative term limits.[2] Campaign spending limitations and abbreviated tenure, however, offer

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* Professor of Law, Stetson University; counsel in *Green v. Mortham*, No. 96-1143-CIV-T-23A (M.D. Fla. filed June 12, 1996) (challenging on First and Fourteenth Amendment grounds primary ballot access requirements in Florida's Tenth Congressional District). I thank Jack McCloskey, Roy Gardner, Bobbi Flowers, Mike Finch, Mike Swygert, Richard Gershon, Les Scharf and Bob Batey for their thoughts and criticisms, and the American Civil Liberties Union Foundation of Florida, Inc. for sponsoring the challenge in *Green v. Mortham*. Any errors of thought or expression are solely those of the author.

[1] *See, e.g.*, Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160 (1994) (arguing for public financing of congressional campaigns).

[2] Between 1990 and the Supreme Court's 1995 decision in *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995), which invalidated term limits, twenty-two states passed laws restricting congressional incumbency. *See* Sean R. Sullivan, Comment, *A Term Limit by Any*

few constitutionally acceptable answers. The Supreme Court has largely divested the states and Congress of power over campaign spending,[3] as well as congressional term limits.[4] If change is to be had, it likely is to take a different path.

History teaches that meaningful reform is often the result of minor adjustments and tinkerings. In this spirit, this Article offers a small calibration to America's political machinery: "Thou shalt not ration the ballot."[5] Placing one's name on the electoral ballot is one of the most noble civic acts in a republican society. Unfortunately, this front door to government is closed to most Americans. Ballots across the country suffer a dearth of palatable candidates, not only because running against highly leveraged incumbents is seen as futile, but also because ballot access is too often laden with imposing hoops and hurdles.

Federal candidates, in particular, are routinely subjected to restrictions beyond the age, citizenship and residence qualifications spelled out by Article I of the Constitution.[6] Because the Constitution delegates initial regulatory authority to the states,[7] exact procedures and conditions vary around the nation.

Other Name?: The Constitutionality of State-Enacted Ballot Access Restrictions on Incumbent Members of Congress, 56 U. PITT. L. REV. 845, 846 (1995).

[3] *See* Buckley v. Valeo, 424 U.S. 1 (1976) (holding that the First Amendment prohibits campaign spending limits); *see also* Colorado Republican Fed. Campaign Comm. v. Federal Elections Comm'n, 116 S. Ct. 2309 (1996) (First Amendment prohibits limits placed on independent expenditures made by parties).

[4] *See* U.S. Term Limits v. Thornton, 514 U.S. 779 (1995) (holding that states cannot impose qualifications additional to those prescribed by Article I); Powell v. McCormack, 395 U.S. 486 (1969) (holding that Congress cannot impose qualifications additional to those prescribed by Article I's requirements of age, residence and citizenship). States presumably remain free to impose term limits on local legislative officers. *But see* Bates v. Jones, 904 F. Supp. 1080 (N.D. Cal. 1995) (holding term limits for state offices unconstitutional under First and Fourteenth Amendments), *aff'd on other grounds sub nom.* Uhler v. Bates, 1997 WL 629803 (9th Cir. 1997).

[5] Compare Learned Hand's remonstrance: "If we are to keep our democracy there must be one commandment: Thou shalt not ration justice." Judge Learned Hand, Thou Shalt Not Ration Justice, Address at the 75th Anniversary Dinner of the Legal Aid Society of New York (Feb. 16, 1951), *in* THE LEGAL AID BRIEF CASE, April 1951, at 3, 5.

[6] *See* U.S. CONST. art. I, § 2 ("No person shall be a Representative who shall not have attained to the Age of twenty five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen."); *id.* § 3 ("No Person shall be a Senator who shall not have attained to the Age of thirty Years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State for which he shall be chosen.").

[7] *See id.* § 4 (states given authority to define "Times, Places and Manner of holding Elections for Senators and Representatives"). Although Congress has the power to overrule

Most states, however, share a common characteristic by requiring that major parties conduct primaries.[8] Winners then face off in general elections.[9]

The primary system is, by itself, unobjectionable. The general election ballot ought to be limited to those candidates who have shown some modicum of preliminary support. Party primaries fill the part. Those candidates who wish to run without participating in primaries can fairly be required to make a surrogate showing of support, something that roughly equates with the rigors of

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these regulations, *see id.*, it has for the most part refused to intervene. Current congressional regulations require only that certain "covered" jurisdictions "preclear" changes in their political systems. *See* 42 U.S.C. § 1973c (1994). The majority of states may alter ballot access restrictions without satisfying the preclearance requirements of section 1973c. *See generally* Morse v. Republican Party of Va., 116 S. Ct. 1186 (1996) (discussing preclearance of changes to primaries and conventions). Of course, a state's regulation of ballot access must comply with constitutional safeguards, such as the Fifteenth Amendment, *see, e.g.*, City of Mobile v. Bolded, 446 U.S. 55 (1980) (recognizing that racial discrimination in voting laws violates Fifteenth Amendment), and cannot otherwise discriminate in violation of federal voting rights laws. *See, e.g.*, 42 U.S.C. § 1973 (1994) (prohibiting dilution of minority voting rights). These topics fall beyond the scope of this Article.

[8] *See Morse*, 116 S. Ct. at 1199–1200 ("[M]ost states [have] effectively divided [their] election into two stages, the first consisting of the selection of party candidates and the second being the general election itself."). Only four states fall outside this model. Virginia allows parties to choose either primaries or conventions. *See* VA. CODE ANN. § 24.2-509(A) (Michie 1993). Connecticut, New Mexico and Utah condition primaries on results in pre-primary conventions. Primaries are only held if more than one candidate at the convention receives a significant modicum of support. *See* CONN. GEN. STAT. ANN. §§ 9-381 to 9-450 (West 1989 & Supp. 1997); N.M. STAT. ANN. § 1-8-33 (Michie 1978); UTAH CODE ANN. § 20A-9-403 (1995). In New Mexico, candidates gain access to pre-primary party ballots by supplying signatures from a number of party members equal to 2% of the party's voters for governor in the district in the last election. *See* N.M. STAT. ANN. § 1-8-33.B (Michie 1978). A candidate who then fails to receive the needed support at the pre-primary convention can still gain access to the primary ballot by collecting signatures from an additional 2% of the party's voters for governor in the district in the last election. *See id.* § 1-8-33.C.

[9] Access to the general election is, for the most part, conditioned on success in primaries. Minor parties and independent candidates are allowed access to the general election ballot if they demonstrate some specified modicum of support, like collecting signatures from a stated percentage of the electorate. *See, e.g.*, FLA. STAT. ANN. § 99.0955(1) & (2) (West 1996) (stating that independent candidates may have their names placed on the general ballot if supported by signatures from 3% of registered voters in the district). Write-in candidates are also often allowed, *see, e.g.*, *id.* § 99.061(3)(a), though states can exclude them completely. *See* Burdick v. Takushi, 504 U.S. 428 (1992) (finding no constitutional right to be a write-in candidate). Experience teaches, however, that only major party candidates have a true chance of winning federal elections. Only one Representative not affiliated with either the Republican or Democratic parties currently sits in the House of Representatives. None are in the Senate.

a primary.[10] But what of running in the primary itself? Is it necessary to condition primary access on some significant demonstration of "seriousness" or support? Granted, something can be said for deterring "frivolous" candidates and maintaining meaningful elections. But are fees ranging from hundreds to thousands of dollars, or requiring thousands of voters' signatures, really necessary?

This Article studies the affect of fee and signature requirements on party primaries and voter choice. Because the United States House of Representatives offers frequent elections and a rich variety of data and practices, I have chosen it as the relevant exemplar for study. I believe, however, that my specific findings have a more general appeal. My basic conclusion is that primary ballots across the United States are over-regulated. Empirical evidence gathered from the 1994 and 1996 congressional primaries reveals that nominal fee and signature requirements tend to limit primaries, on average, to fewer than three candidates. Because even a relatively unregulated political market can be expected to maintain a manageable number of candidates, little is gained by imposing large fee and signature requirements. De-regulation (and popularization) of the ballot access laws across the United States is in order.

Also considered is the impact of popular primaries on general elections. General election data from 1994 and 1996 reveal that incumbents uniformly prospered in congressional elections. Although incumbents' success rates decreased with greater ballot access, they did not descend below historic levels. Like it or not, incumbents win, and win often, regardless of primary ballot restrictions. Still, incumbents' success rates were significantly lower in those states with more candidates and greater access. A marginal term limit effect might therefore be realized by opening the ballot. Although open access will not systemically rout incumbents from office, it offers a likelihood of increased freshman representation.

I. THE LAW OF BALLOT ACCESS RESTRICTIONS

Typical ballot access restrictions for political primaries include filing fees and petition/signature requirements. While about one-third of the states rely solely on signature collection,[11] a majority today use filing fees as the principal

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[10] This normally takes the form of a signature drive, which, again, appears unobjectionable.

[11] Sixteen states use signatures as opposed to fees to restrict primary access. *See* ARIZ. CONST. art. VII, § 14 (no filing fee for any office); COLO. REV. STAT. § 1-4-801(2)(b) (1980 & Supp. 1996) (no filing fee; qualify by petition with signatures); 10 ILL. COMP. STAT. ANN. 5/7-10(b) (West 1993 & Supp. 1997) (no filing fee; qualify by petition with signatures); IOWA CODE ANN. § 43.20.3 (West 1991) (no filing fee; qualify by petition with signatures); ME.

limitation on ballot access.[12] Some of these, like Alabama, Alaska, Maryland,

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REV. STAT. ANN. tit. 21-A, § 335.5.C (West 1993) (no filing fee; qualify by petition with signatures); MASS. ANN. LAWS ch. 53, § 6 (Law. Co-op. 1990 & Supp. 1997) (no filing fee; qualify by petition with signatures); MICH. COMP. LAWS ANN. § 168.133 (West 1989 & Supp. 1997) (no filing fee; qualify by petition with signatures); N.J. STAT. ANN. § 19:23-8 (West 1989) (no fee required; qualify by petition with signatures); N.M. STAT. ANN. § 1-8-33 (Michie 1978) (no fee required; qualify by petition with signatures); N.Y. ELEC. LAW § 6-136.2(g) (McKinney 1978 & Supp. 1997) (no fee required; qualify by petition with signatures); N.D. CENT. CODE § 16.1-11-06 (1991) (no fee required; qualify by petition with signatures); R.I. GEN. LAWS § 17-14-7(b) (1996) (no fee required; qualify by petition with signatures); S.D. CODIFIED LAWS § 12-6-7 (Michie 1995) (no fee required; qualify by petition with signatures); TENN. CODE ANN. § 2-5-101(b)(1) (1994 & Supp. 1996) (no fee required; qualify by petition with signatures); VT. STAT. ANN. tit. 17, § 2355(1) (1982) (no fee required; qualify by petition with signatures); WIS. STAT. ANN. § 8.15(6)(b) (West 1996) (no fee required; qualify by petition with signatures). Five states, Hawaii, Kentucky, Ohio, Pennsylvania and Virginia, currently require both fees and signatures. *See* HAW. REV. STAT. §§ 12-5(a) & 12-6(b)(1) (1993) ($75 fee and 25 signatures); KY. REV. STAT. ANN. § 118.125(2) (Michie 1993 & Supp. 1996) ($500 fee and 2 signatures); OHIO REV. CODE ANN. § 3513.10(A) & (B) (Anderson 1996) ($85 fee and 50 signatures); PA. STAT. ANN. tit. 25, § 2872.1 (West 1994) (signatures from 1000 party members plus $150 filing fee); VA. CODE ANN. § 24.2-253 (Michie 1993) (fee equal to 2% of annual salary and signatures from ½ of 1% of registered voters in district). Idaho required 500 signatures and a $150 fee in 1994, but in 1996 required the payment of a $300 fee or alternatively collection of 500 signatures. *See* 1996 Idaho Sess. Laws ch. 28 (codified at IDAHO CODE §§ 34-605 & 34-626 (Supp. 1997)) (raising fee to $300 and allowing 500 signatures as alternative). Connecticut uses conventions to determine who participates in party primaries, if any. *See* FEDERAL ELECTIONS COMM'N, FEDERAL ELECTIONS 96, ELECTION RESULTS FOR THE U.S. PRESIDENT, THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES 91 (1997) [hereinafter "1996 ELECTIONS REPORT"] ("A candidate endorsed by the party at the party convention is the nominee. If a qualified challenger to the party endorsed candidate receives 15% of the delegate vote on roll call at the convention, a primary election is held between the two candidates."). The District of Columbia, which has not been included in this study, also uses signatures to restrict access to its congressional ballot. *See* D.C. CODE ANN. § 1-1312(i)(1)(B) (1981) (no filing fee; qualify by petition with signatures).

[12] *See* ALASKA STAT. § 15.25.050(a) (Michie 1996) ($100 filing fee for House); CAL. ELEC. CODE § 8104(b) (West 1996) (1% of annual salary); HAW. REV. STAT. § 12-6(b)(1) (1993) ($75 filing fee for House); IDAHO CODE § 34-605(4) (Supp. 1997) ($300 filing fee for House); KAN. STAT. ANN. § 25-206(a) (1993) (1% of annual salary); KY. REV. STAT. ANN. § 118.255(1) (Michie 1993 & Supp. 1996) ($500 filing fee for House); LA. REV. STAT. ANN. § 18:464.B(1) & C (West Supp. 1997) ($600 filing fee for House and up to $300 assessment by party); MD. ANN. CODE art. 33, § 4A-6(c) (1997) ($100 filing fee); MINN. STAT. ANN. § 204B.11(1)(a) (West Supp. 1997) ($300 filing fee); MISS. CODE ANN. § 23-15-297(b) (1990 & Supp. 1997) ($200 filing fee); MO. ANN. STAT. § 115.357.1(1) (West 1997) ($100 filing fee); MONT. CODE ANN. § 13-10-202(3) (1993) (1% of annual salary); NEB. REV. STAT. § 32-608(2) & (5) (Supp. 1996) (1% of annual salary and waiver for indigence); NEV. REV.

Nebraska and Utah, provide waivers for candidates who cannot afford fees.[13] Most, however, do not waive fees, but instead allow alternative access through petition/signature mechanisms.[14] These alternatives allow potential candidates to gather a specified number of voters' signatures, usually from registered party members residing in the district, in place of paying fees. Only one state, Indiana, eschews both fees and signatures in favor of free and open House primaries.[15]

A. *Constitutional Challenges*

Whether fees or signatures,[16] ballot restrictions are subject to two principal constitutional challenges. First, they interfere with political and associational rights guaranteed by the First Amendment. A potential candidate has a

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STAT. ANN. § 293.193.1 (Michie 1995) ($300 filing fee); N.H. REV. STAT. ANN. §§ 655:19 & 655:19-c.I(b) (1996) ($5000 filing fee, but only $50 if candidate agrees to campaign spending limits).

[13] *See* ALA. CODE § 17-16-15 (1995); ALASKA STAT. § 15.050(a) (Michie 1996); MD. ANN. CODE art. 33, § 4A-6(c) (1997); NEB. REV. STAT. § 32-608(2) & (5) (Supp. 1996); UTAH CODE ANN. § 20A-9-201(6)(a)(ii) (1995).

[14] A few states continue to impose fees without expressly providing for alternative access mechanisms. *See* KY. REV. STAT. ANN. § 118.125(2) (Michie 1993 & Supp. 1996) ($500 fee together with two signatures); MISS. CODE ANN. § 23-15-297(b) (1990 & Supp. 1997) ($200 fee); NEV. REV. STAT. ANN. § 293.193.1 (Michie 1995) ($300 filing fee); OHIO REV. CODE ANN. § 3513.10(A) & (B) (Anderson 1996) ($85 fee together with 50 signatures); PA. STAT. ANN. tit. 25, §§ 2872.1 & 2873.1 (West 1994) ($150 fee together with 1000 signatures); S.C. CODE ANN. § 7-13-40 (Law. Co-op. Supp. 1996) (fee equal to 1% of congressional salary); WYO. STAT. ANN. § 22-5-208(a)(ii) (Michie 1997) ($200 fee). To the extent these fees exceed administrative costs, they are of questionable validity under *Bullock v. Carter*, 405 U.S. 134 (1972), and *Lubin v. Panish*, 415 U.S. 709 (1974). *See infra* notes 24–34 and accompanying text.

[15] Although Indiana has no restrictions on access to the House of Representatives, candidates for the United States Senate must produce 5000 signatures. *See* IND. CODE ANN. § 3-8-2-8(a) (West 1997) (no fee or signatures needed for House; signatures of 5000 voters needed to support ballot access for U.S. Senate).

[16] Challenges have more often been brought to fee requirements, though it is clear that signature requirements might also prove unconstitutionally burdensome. *See, e.g.*, Rockefeller v. Powers, 917 F. Supp. 155 (E.D.N.Y.), *aff'd*, 78 F.3d 44 (2d Cir. 1996) (striking down requirement that candidates for presidential primary collect signatures from 1250 voters or 5% of registered party members); Johnston v. Luna, 338 F. Supp. 355 (N.D. Tex. 1972) (striking down Texas alternative requiring signatures from voters "equal to 10 percent of the entire vote cast for that party's candidate for governor in the last preceding election"); *cf. Bullock*, 405 U.S. at 141–42 n.17 ("[W]e intimate no view on the merits of [the *Luna*] controversy.").

constitutional right to associate with the party of his choosing, at least if the party will have him.[17] State laws that block or limit primary ballot access run head long into both the candidate's associational interests and the rights of the party's members. Importantly, associational rights are at their highest peak when the state regulates party primaries. While the American experience proves that political parties' selection methods warrant regulation,[18] no one will deny the relevance of the First Amendment.[19]

Second, because ballot access and voting are fundamental rights, restrictions and classifications raise equal protection concerns. This is particularly true of filing fees, which tend to treat affluent candidates differently from those of more modest means.[20] Even signature requirements can be so debilitating that equal protection becomes a problem.[21] The classic example is a petition alternative requiring thousands of signatures, which tends to benefit

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[17] *See* Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995) (holding that parade organizers have a First Amendment right to exclude groups from parade).

[18] *See, e.g.*, Terry v. Adams, 345 U.S. 461 (1953) (holding that party rules excluding blacks violate Fifteenth Amendment); Smith v. Allwright, 321 U.S. 649 (1944) (same).

[19] *See, e.g.*, Norman v. Reed, 502 U.S. 279, 288 (1992) ("[T]he constitutional right of citizens to create and develop new political parties . . . advances the constitutional interest of like-minded voters to gather in pursuit of common political ends . . . ."); Eu v. San Francisco County Democratic Cent. Comm., 489 U.S. 214 (1989) (striking down state election law that prohibited political parties from endorsing candidates in primaries and regulated parties internal affairs); Tashjian v. Republican Party of Conn., 479 U.S. 208 (1986) (holding closed primary statute unconstitutional). Compare *Morse v. Republican Party of Va.*, 116 S. Ct. 1186, 1216 (1996) (Scalia, J., dissenting), in which Justice Scalia stated:

> [W]e have always treated government assertion of control over the internal affairs of political parties—which, after all, are simply groups of like-minded individual voters—as a matter of the utmost constitutional consequence. What is at issue in this case, therefore, is not merely interpretation of § 5 of the Voting Rights Act, 42 U.S.C. § 1973c, but, inextricably bound up with that interpretation, the First Amendment freedom of political association.

Id. (citations omitted).

[20] *See* Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273, 287 (1993) ("When the costs of running for office interfere with political candidacy and meaningful participation on the basis of wealth, equal protection requires close judicial scrutiny of the arrangement.").

[21] *See, e.g.*, Rockefeller v. Powers, 917 F. Supp. 155 (E.D.N.Y.), *aff'd*, 78 F.3d 44 (2d Cir. 1996) (striking down requirement that candidates for presidential primary collect signatures from 1250 voters or 5% of registered party members).

incumbents and wealthy candidates who can afford to hire canvassers.[22] Though not involving any suspect class, the fundamental nature of running for office causes courts to apply heightened scrutiny.[23]

The Supreme Court has applied these principles to political primaries on two occasions. In *Bullock v. Carter*,[24] the Court struck down a Texas law that required all candidates to pay a filing fee in order to run in the state's primaries. Fees varied with the office, but all shared a common characteristic—they were substantial.[25] Applying heightened scrutiny, the Court unanimously concluded in *Bullock* that Texas's excessive filing fees violated the Equal Protection Clause of the Fourteenth Amendment:

> Because the Texas filing-fee scheme has a real and appreciable impact on the exercise of the franchise, and because this impact is related to the resources of the voters supporting a particular candidate, we conclude. . . that the laws must be "closely scrutinized" and found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster.[26]

The state's asserted justifications—first, insuring that only serious candidates

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[22] The Court has held that candidates have a First Amendment right to hire canvassers to collect signatures. *See* Meyer v. Grant, 486 U.S. 414 (1988).

[23] An argument might also be made that filing fees for federal office violate section 6 of Article I of the United States Constitution, which provides that states cannot alter the salary for federal office. *See* U.S. CONST. art. I, § 6 (Congress sets salary for federal elected office). One might argue that large fees diminish congressional salaries. Additionally, one can argue that large fees establish an impermissible property qualification. *See* U.S. Term Limits v. Thornton, 514 U.S. 779 (1995) (Qualifications Clause of Article I, section 5 prohibits states from adding qualifications to those expressed in the Constitution). In *Thornton*, the Supreme Court invalidated Arkansas's attempt at imposing term limits on its members of the House and Senate. The Court observed that property qualifications are also unconstitutional. *See id.* at 823–25. Importantly, the Court explained that a state may not indirectly avoid the limitations of the Qualifications Clause by deeming its restrictions "limitations on ballot access." Instead, what formally looks like a ballot access requirement might really be an impermissible qualification. "[A]llowing States to evade the Qualifications Clauses by 'dress[ing] eligibility to stand for Congress in ballot access clothing' trivializes the basic principles of our democracy that underlie those Clauses." *Id.* at 831. Hence, the Court struck down Arkansas's attempt to limit its ballots to non-incumbents and incumbents who had served fewer than the maximum number of terms. I express no opinion on the worth of these arguments and have not seen them in any reported decisions.

[24] 405 U.S. 134 (1972).

[25] The fee for County Commissioner, for example, was $1424.60. For County Judge, the fee was $6300. *Id.* at 135–36.

[26] *Id.* at 144.

run, and second, defraying the costs of administering primaries—were deemed insufficient to justify the fee.[27] Instead, the Court found that the only constitutionally acceptable choice was to socialize the costs of primaries.[28]

Two years later, in *Lubin v. Panish*,[29] the Court addressed a more modest California statute that required that House primary candidates pay a fee equal to 1% of the congressional salary, $425 under the prevailing pay schedule. Unlike Texas, California did not claim that the fee was intended to finance elections; rather, it claimed that the fee was needed to "keep the ballot from being overwhelmed with frivolous or otherwise nonserious candidates."[30] The Court again rejected this argument, concluding that even California's more modest fee did not satisfy equal protection because it was an inefficient way of screening out frivolous candidates:

> A large filing fee may serve the legitimate function of keeping ballots manageable but, standing alone, it is not a certain test of whether the candidacy is serious or spurious. A wealthy candidate with not the remotest chance of election may secure a place on the ballot by writing a check. Merchants and other entrepreneurs have been known to run for public office simply to make their names known to the public. We have also noted that prohibitive filing fees, such as those in *Bullock*, can effectively exclude serious candidates. . . . Whatever may be the political mood at any given time, our tradition has been one of hospitality toward all candidates without regard to their economic status.[31]

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[27] *See id.* at 147–48. The Court stated:

> We . . . reject the theory that since the candidates are availing themselves of the primary machinery, it is appropriate that they pay that share of the cost that they have occasioned. . . . [T]he costs do not arise because candidates decide to enter a primary or because the parties decide to conduct one, but because the State has, as a matter of legislative choice, directed that party primaries be held.

Id.

[28] *See id.* at 148 ("It seems appropriate that a primary system designed to give the voters some influence at the nominating stage should spread the cost among all of the voters in an attempt to distribute the influence without regard to wealth.").

[29] 415 U.S. 709 (1974).

[30] *Id.* at 714.

[31] 415 U.S. at 717–18. Similar sentiments were expressed in *Bullock*:

> [E]ven assuming that every person paying the large fees required by Texas law takes his own candidacy seriously, that does not make him a "serious candidate" in the popular sense. If the Texas fee requirement is intended to regulate the ballot by weeding out

Although *Bullock* and *Lubin* speak often to equal protection, heightened scrutiny in both cases was predicated largely on the First Amendment norm of free political participation.[32] One has a right to associate with others for political ends, which necessarily includes running for office.[33] It is the fundamental nature of this right, together with correlative rights of voters to choose their representatives, which causes increased judicial scrutiny.[34]

Just as its textual references have been ambiguous, the Court's constitutional analysis has been somewhat obtuse. The Court has wandered between strict scrutiny and deference to state legislatures, with little to guide a speculative student or scholar. Recently, however, the Court reaffirmed heightened scrutiny's application to political filing fees and signature

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> spurious candidates, it is extraordinarily ill-fitted to that goal . . . .

405 U.S. at 146.

[32] Contrast, for example, denials of equal access to judicial, as opposed to political, fora. The Supreme Court has repeatedly refused to apply heightened scrutiny to courthouse filing fees. *See* United States v. Kras, 409 U.S. 434 (1973) (finding no right to access bankruptcy court without paying fee); Ortwein v. Schwab, 410 U.S. 656 (1973) (finding no right to challenge reduction in welfare without paying filing fee). Access to the judiciary is not by itself a fundamental right, and equal protection independently cannot support anything more than rationality review. Only where an independent fundamental right, such as marriage, *see, e.g.*, Boddie v. Connecticut, 401 U.S. 371 (1971) (establishing right to access divorce court without paying fee), or child rearing, *see, e.g.*, M.L.B. v. S.L.J., 117 S. Ct. 555 (1996) (finding right to appeal termination of parental rights without paying fees), are at stake will the Court use more searching scrutiny. Similarly, ballot access generates heightened scrutiny not because it affects groups in different ways, but because it impinges upon a fundamental political right.

[33] The Court has best analyzed the political applications of the First Amendment in the context of minor parties and independent candidates attempting to access *general* election ballots. *See* JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 867 (5th ed. 1995). Still, it appears clear that these same principles apply with at least the same force where primaries are at stake.

[34] *See M.L.B.*, 117 S. Ct. at 567–68 (1996). The Court stated in *M.L.B.*:

> The State's need for revenue to offset costs, in the mine run of cases, satisfies the rationality requirement; States are not forced by the Constitution to adjust all tolls to account for "disparity in material circumstances."
>
> But our cases solidly establish two exceptions to that general rule. The basic right to participate in political processes as voters and candidates cannot be limited to those who can pay for a license.

Id. (citations omitted).

requirements. In *Timmons v. Twin Cities Area New Party*,[35] which upheld Minnesota's anti-fusion law, the Court stated that "severe burdens" on the electoral process, such as "exclud[ing] a particular group of citizens, or a political party, from participation in the election process" are subject to strict scrutiny under the First and Fourteenth Amendments.[36] "Lesser burdens," meanwhile, "trigger less exacting scrutiny, and . . . important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions."[37] Along these same lines, dicta in *M.L.B. v. S.L.J.*, observed that "[t]he basic right to participate in political processes as voters and candidates cannot be limited to those who can pay for a license."[38]

Whatever the exact line between "severe" and "lesser" burdens, the Court's citations to *Bullock* as a classic example of an impermissible restriction in both *Timmons* and *M.L.B.* indicate that filing fees will continue to receive staunch scrutiny. At a minimum, they must satisfy the means prong of what is often referred to as intermediate scrutiny; that is, they must prove truly necessary to achieve legitimate state interests.[39] Because state interests in

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[35] 117 S. Ct. 1364 (1997). An anti-fusion law prevents parties from sharing candidates. Hence, a candidate endorsed by one party cannot be endorsed by another.

[36] *Id.* at 1370.

[37] *Id.* It stated in full:

> When deciding whether a state election law violates First and Fourteenth Amendment associational rights, we weigh the "'character and magnitude'" of the burden the State's rule imposes on those rights against the interests the State contends justify that burden, and consider the extent to which the State's concerns make the burden necessary. Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's "'important regulatory interests'" will usually be enough to justify "'reasonable, nondiscriminatory restrictions.'"

Id. (citations omitted).

[38] 117 S. Ct. at 568 & n.14 (1996) (citing Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), Bullock v. Carter, 405 U.S. 134 (1972), and Lubin v. Panish, 415 U.S. 709 (1974)). *M.L.B.* held that indigent parents have the right to appeal the termination of their parental rights without paying otherwise required fees. *See id.* at 569–70.

[39] *See, e.g.*, Anderson v. Celebrezze, 460 U.S. 780, 789 (1983) (holding that a court must "identify and evaluate the precise interests put forward by the state as justifications for the burden imposed by its rule"); Duke v. Cleland, 954 F.2d 1526, 1531–33 (11th Cir. 1992) (arguing that legitimate and compelling state interests can outweigh some burdens put on the right to vote); Fulani v. Krivanek, 973 F.2d 1539, 1542–43 (11th Cir. 1992) ("Once a plaintiff has demonstrated the burden on her fundamental right, the state must show 'that the law advances a compelling interest and is narrowly tailored to meet that interest.'" (quoting *Duke*, 954 F.2d at 1529)).

discouraging frivolous candidates and "winnowing down" the ballot have been deemed compelling,[40] it is this means analysis that limits the number of fees and signatures states may require.

B. *Establishing Constitutional Limits*

Two clear points emerge from *Bullock* and *Lubin*: a state cannot force candidates or parties to finance primaries that the state itself requires,[41] and a state cannot demand filing fees as the sole indicium of a candidate's seriousness. Fees must be designed to exclude frivolous candidates and alternatives must be made available to accommodate candidates who cannot afford them.[42] An important question left unanswered by the Court is whether an otherwise excessive fee fails notwithstanding the existence of an alternative access

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[40] *See* American Party of Tex. v. White, 415 U.S. 767, 782 (1974) ("But we think that the State's admittedly vital interests are sufficiently implicated to insist that political parties appearing on the general ballot demonstrate a significant, measurable quantity of community support.") (footnote omitted). In *Morse v. Republican Party of Va.*, 116 S. Ct. 1186, 1199 (1996), the Court stated:

> Just like a primary, a convention narrows the field of candidates from a potentially unwieldy number to the serious few who have a realistic chance to win the election. We have held, in fact, that the State's compelling interest in winnowing down the candidates justifies substantial restrictions on access to the ballot.

Id.

[41] *See* Bullock v. Carter, 405 U.S. 134, 148–49 (1972) (holding that state law that forces candidates to finance primaries is invalid); Republican Party of Ark. v. Faulkner County, 49 F.3d 1289 (8th Cir. 1995) (holding that state law that requires parties to finance primaries is invalid). In *Faulkner County*, the Eighth Circuit struck down an Arkansas statute that required political parties to conduct *and fund* primaries, the result being large filing fees charged by the two major political parties. Notwithstanding that candidates could alternatively access the general election ballot by filing as independents and submitting petitions signed by three percent of qualified voters, *see id.* at 1295, the Eighth Circuit struck down the funding requirement as violative of the First and Fourteenth Amendments. *See id.* at 1301. Whether by an outright funding requirement or by an unduly large filing fee, the rule is clear: a state cannot shift the monetary cost of political primaries to parties and candidates. Primaries mandated by the state must be financed by the state.

[42] *See, e.g.*, Andress v. Reed, 880 F.2d 239, 241–42 (9th Cir. 1989) (sustaining California's signature alternative which was adopted as a response to *Lubin*); *see also* Kevin Cofsky, Comment, *Pruning the Political Thicket: The Case for Strict Scrutiny of State Ballot Access Restrictions*, 145 U. PA. L. REV. 353, 377–78 & n.114 (1996) (alternative to fee is presumably required).

mechanism.[43] The question is important because many states today assume that they may charge fees of any size so long as they provide alternatives.[44]

States that take this tack must understand two important caveats to *Lubin*'s prescription for alternative access mechanisms. First, *Lubin* clearly stated that alternatives must be reasonable.[45] Even a reasonable fee will not save an unreasonable signature alternative. Montana's requiring signatures from 5% of the last election's electorate (over 8500 signatures),[46] for example, should severely test constitutional waters notwithstanding the state's constitutionally modest filing fee of $1336.[47] Second, alternatives that provide access different in kind, such as independent access to the general election ballot,[48] or the availability of write-in space on the primary ballot,[49] are insufficient.

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[43] In *Andress v. Reed*, 880 F.2d 239, 242 (9th Cir. 1989), the court assumed that an alternative, such as supplying signatures, necessarily saved even an excessive filing fee. The court never questioned whether the fee was independently reasonable, nor did it find the alternative unreasonable, even though the alternative required 10,000 signatures.

[44] In answers to interrogatories propounded in *Green v. Mortham*, No. 96-1143-CIV-T-23A (M.D. Fla. filed June 12, 1996) (challenging Florida's $10,020 fee), for example, the State of Florida explained: "the existence of a signature petition alternative to a filing fee precludes an attack on the filing fee." (On file with author).

[45] *See* Lubin v. Panish, 415 U.S. 709, 718 (1974) ("[W]e hold that in the absence of reasonable alternative means of ballot access, a State may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay.").

[46] *See* MONT. CODE ANN. § 13-10-203(b) (1995) (requiring signatures from 5% of voters in last election; totaled 8569 in 1996).

[47] *See id.* § 13-10-202(3) (fee equal to 1% of congressional salary). Similarly, Oklahoma's requiring signatures from 5% of registered party members, which totaled between 6853 and 12,440 signatures in 1996, should prove invalid notwithstanding its fee of only $750. *See* OKLA. STAT. tit. 26, § 5-112 (1997).

[48] *See, e.g.*, Republican Party of Ark. v. Faulkner County, 49 F.3d 1289 (8th Cir. 1995). In *Faulkner County*, the Eighth Circuit struck down an Arkansas statute that required political parties to conduct *and fund* primaries, the result being large filing fees charged by the two major political parties. Notwithstanding that candidates could alternatively access the general election ballot by filing as independents and submitting petitions signed by three percent of qualified voters, *see id.* at 1295, the Eighth Circuit struck down the funding requirement as violative of the First and Fourteenth Amendments. *See id.* at 1301.

[49] Neither *Bullock* nor *Lubin* expressly dealt with this issue. In *Bullock*, Texas law did not allow write-in votes in primaries. *See* Bullock v. Carter, 405 U.S. 134, 137 & n.6 (1972). In *Lubin*, California law allowed write-ins in primaries, but required that write-in candidates also pay the fee. *See Lubin*, 415 U.S. at 711. Hence, *Lubin* did not involve a true write-in alternative. Still, the Court in *Lubin* opined that even a free write-in alternative would be insufficient as a constitutional matter:

> The realities of the electoral process . . . strongly suggest that "access" via write-in votes falls far short of access in terms of having the name of the candidate on the

1. *Fees*

Symmetry suggests that if signature requirements must be independently reasonable, then so must fees. The constitutional concern, after all, is not just access; it is *equal* access. Large alternative fees grant benefits to affluent candidates that are not available to all, regardless of the alternative. Granted, the same can be said of almost any non-nominal fee. But the larger the fee, the greater the inequity. The farther fees stray from signature alternatives, the greater the danger that the electoral process will become, and be seen as, an elite prerogative. In order to assure a semblance of equality, fees and alternatives should be roughly proportional, at least at the extremes. Just as signature requirements should not dwarf fees, fees should not stray too far from what reasonably can be expected of a candidate using an alternative.

This, coupled with constitutional common sense, strongly suggests that some identifiable limit on fees must exist.[50] Sheer volume, such as a $100,000 fee, would lead most to agree on invalidity, regardless of alternatives.[51] Fees that dwarf or closely approach an office's annual salary should raise most eyebrows. In *Bullock*, for example, the Court expressed amazement that several fees amounted to more than three-quarters of the respective officials' salaries.[52]

Dictum in *Lubin* offers support. While the Court in *Lubin*[53] strongly implied that certain unreasonable fees—like the 1% charge at issue—might be saved by reasonable signature alternatives,[54] it was careful to distinguish the "patently exclusionary" fees[55] at issue in *Bullock*. Three categories of fees therefore appear to exist: "patently exclusionary" fees; nominal or

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> ballot. . . . [A]lthough we need not decide the issue, the intimation that a write-in provision without the filing fee . . . would constitute "an acceptable alternative" appears dubious at best.

Id. at 719 n.5. *But see Lubin*, 415 U.S. at 722 (Blackmun, J., concurring) ("I would regard a write-in procedure, free of fee, as an acceptable alternative.").

[50] *See Bullock*, 405 U.S. at 143 ("[T]he very size of the fees imposed under the Texas system gives it a patently exclusionary character.").

[51] *See, e.g.*, Dixon v. Maryland State Admin. Bd. of Election Laws, 878 F.2d 776 (4th Cir. 1989) (striking down $150 filing fee for local office notwithstanding availability of complete waiver). *Dixon* stands for the proposition that an excessive fee cannot be saved by even a reasonable alternative. Not even a waiver could sustain the fee in *Dixon*; the waiver instead demonstrated that the fee was not necessary to any legitimate state interest. *See id.* at 783–84.

[52] *Bullock*, 405 U.S. at 138 n.10.

[53] 415 U.S. at 718.

[54] *See id.* at 718–19.

[55] *See id.* at 715 n.4.

administrative fees; and fees, like those in *Lubin*, which fall between the extremes. The first are always invalid, the second valid, and the third invalid unless coupled with reasonable alternatives.

Recognizing that "patently exclusionary" fees exist leaves open the nagging problem of drawing judicially manageable lines. Arguments can be made for several different limits. An argument can even be made that *Bullock* and *Lubin*, coupled with the voting rights case of *Harper v. Virginia Bd. of Elections*,[56] invalidate all fees exceeding administrative costs.[57] Although this argument has appeal, it appears too late in the day to argue that the Constitution either prohibits access fees or limits them to administrative costs. Half of the states today use fees that exceed administrative or nominal costs,[58] and lower courts

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[56] 383 U.S. 663 (1966). *Harper* held that poll taxes in state elections violate the Equal Protection Clause of the Fourteenth Amendment. For federal elections, the Twenty-fourth Amendment previously banned poll taxes in 1962. U.S. CONST. amend. XXIV. Because *Harper* is to voting what *Bullock* is to ballot access, a credible analogy can be drawn. *See* Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1304 (1993). One might argue, for example, that if excessive fees can be saved by alternatives, then poll taxes too should be saved by other means of proving voter seriousness. Take literacy tests, which have passed constitutional scrutiny. *See* Lassiter v. Northampton Election Bd., 360 U.S. 45 (1959). They are currently illegal under federal election laws, *see* 42 U.S.C. § 1973aa (1994), but they are still constitutional. If provided as an alternative, could they save a poll tax that otherwise violates *Harper*? Of course, the issue is moot today. But it would seem that the constitutional answer ought to be no. And if no, it casts a measure of doubt on the states authority to save excessive ballot fees by providing alternatives.

[57] *See, e.g.*, Dixon v. Maryland State Admin. Bd. of Election Laws, 878 F.2d 776 (4th Cir. 1989) (striking down as excessive $150 fee for local office).

[58] *See* ALASKA STAT. § 15.25.050(a) (Michie 1996) ($100 filing fee for House); CAL. ELEC. CODE § 8104(b) (West 1996) (1% of annual salary); FLA. STAT. ANN. § 99.092(1) (West 1996) (6% of congressional salary); GA. CODE ANN. § 21-2-131(a)(2) (1993) (3% of congressional salary); HAW. REV. STAT. § 12-6(b)(1) (1993) ($75 filing fee for House); IDAHO CODE § 34-605(4) (Supp. 1997) ($300 filing fee for House); KAN. STAT. ANN. § 25-206(a) (1993) (1% of annual salary); KY. REV. STAT. ANN. § 118.255(1) (Michie 1993) ($500 filing fee for House); LA. REV. STAT. ANN. § 18:464.B(1) & C(1) (West Supp. 1997) ($600 filing fee for House and up to $300 assessment by party); MD. ANN. CODE art. 33, § 4A-6(c) (1997) ($100 filing fee); MINN. STAT. ANN. § 204B.11(1)(a) (West Supp. 1997) ($300 filing fee); MISS. CODE ANN. § 23-15-297(b) (1991) ($200 filing fee); MO. REV. STAT. § 115.357.1(1) (1997) ($100 filing fee); MONT. CODE ANN. § 13-10-202(3) (1993) (1% of annual salary); NEB. REV. STAT. § 32-608(2) & (5) (Supp. 1996) (1% of annual salary and waiver for indigence); NEV. REV. STAT. ANN. § 293.193.1 (Michie 1995) ($300 filing fee); N.H. REV. STAT. ANN. §§ 655:19 & 655:19-c.I(b) (1996) ($5000 filing fee, but only $50 fee if candidate agrees to campaign spending limits); N.C. GEN. STAT. § 163-107(a) (1996) (1% of annual salary); N.D. CENT. CODE § 16.1-11-06 (1991) (no fee required; qualify by petition with signatures); OHIO REV. CODE ANN. § 3513.10(A) & (B)(1) (Banks-Baldwin Supp. 1997) ($85 filing fee); OKLA. STAT. tit. 26, § 5-112 (1997) ($750 filing fee); OR. REV. STAT.

have consistently sustained those that have been challenged.[59]

One might also argue that the 1% figure to which *Lubin* alluded divides salvageable from patently invalid fees. Although I think that 1% of the congressional salary sounds about right,[60] I cannot ascribe this to the holding in *Lubin*. The Supreme Court has understandably shied away from selecting arbitrary limits. *Lubin* played the cards dealt, which included a 1% fee. That 1% is valid when coupled with an alternative does not necessarily imply that larger fees are invalid.

Rather than have the Court select an arbitrary figure, a more productive approach is to borrow consensus figures already in place. The Court's analysis under the First and Fourteenth Amendments requires that fees prove necessary to legitimate state interests. Necessity can be assessed by comparing fees of the several states.[61] Sharp digression from a national convention impeaches credibility. If every other state gets by with x, why must this state charge multiples of x, or x plus y? In the absence of a persuasive explanation that the additional restriction is necessary, it should prove invalid.

Of those states using fees either as the sole method for qualification or as an alternative method of qualification, well over three-quarters have settled on fees less than or equal to 1% of the congressional salary[62]—$1336 under the 1996

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§ 249.056(1)(b) (1991) ($100 filing fee); PA. STAT. ANN. tit. 25, § 2873(b)(1) (West 1994) ($150 filing fee); S.C. CODE ANN. § 7-13-40 (Law Co-op. Supp. 1996) (1% of annual salary); TEX. ELEC. CODE ANN. § 172.024(a)(3) (West Supp. 1997) ($2500 filing fee); UTAH CODE ANN. § 20A-9-201(6)(a)(ii) (1995) (1/8 of 1% of salary; waived if indigent); VA. CODE ANN. §§ 24.2-523 & 24.2-521.2 (Michie 1993) (2% of annual salary, plus signatures from ½ of 1% of voters in district); WASH. REV. CODE § 29.15.050 (1993) (1% of annual salary); W. VA. CODE § 3-5-8(a) (1994) (1% of annual salary); WYO. STAT. ANN. § 22-5-208(a)(ii) (Michie 1997) ($200 filing fee).

[59] *See, e.g.*, Little v. Florida Dep't of State, 19 F.3d 4 (11th Cir. 1994) (sustaining fee equal to 4 and 1/2% of judicial salary); Andress v. Reed, 880 F.2d 239 (9th Cir. 1989) (sustaining fee equal to 1% of congressional salary); Adams v. Askew, 511 F.2d 700 (5th Cir. 1975) (sustaining fee of 5% of official's salary). *But see* Dixon v. Maryland State Admin. Bd. of Election Laws, 878 F.2d 776 (4th Cir. 1989) (striking down $150 fee for local office).

[60] *See infra* notes 62–64 and accompanying text.

[61] *See, e.g.*, Rockefeller v. Powers, 917 F. Supp. 155, 160 (E.D.N.Y.), *aff'd*, 78 F.3d 44 (2d Cir. 1996) (holding that other states' practices indicate that New York's election regulations were not necessary).

[62] *See* ALASKA STAT. § 15.25.050(a) (Michie 1996) ($100 filing fee for House); CAL. ELEC. CODE § 8104(b) (West 1996) (1% of annual salary); DEL. CODE ANN. tit. 15, § 3103(b) (1993) (party sets fee not to exceed 1% of annual salary); HAW. REV. STAT. § 12-6(b)(1) (1993) ($75 filing fee for House); IDAHO CODE § 34-605(4) (Supp. 1997) ($300 filing fee for House); Indiana (no fee); KAN. STAT. ANN. § 25-206(a) (1993) (1% of annual salary); KY. REV. STAT. ANN. § 118.255(1) (Michie 1993) ($500 filing fee for House); LA. REV.

pay schedule.[63] Roughly half charge $500 or less.[64] Only five states,[65] Florida,

STAT. ANN. § 18:464.B(1) & C(1) (West Supp. 1997) ($600 filing fee for House and up to $300 assessment by party); MD. ANN. CODE art. 33, § 4A-6(c) (1997) ($100 filing fee); MINN. STAT. ANN. § 204B.11(1)(a) (West Supp. 1997) ($300 filing fee); MISS. CODE ANN. § 23-15-297(b) (1991) ($200 filing fee); MO. REV. STAT. § 115.357.1(1) (1997) ($100 filing fee); MONT. CODE ANN. § 13-10-202(3) (1993) (1% of annual salary); NEB. REV. STAT. § 32-608(2) & (5) (Supp. 1996) (1% of annual salary and waiver for indigence); NEV. REV. STAT. ANN. § 293.193.1 (Michie 1995) ($300 filing fee); N.C. GEN. STAT. § 163-107(a) (1996) (1% of annual salary); N.D. CENT. CODE § 16.1-11-06 (1991) (no fee required; qualify by petition with signatures); OHIO REV. CODE ANN. § 3513.10(A) & (B)(1) (Banks-Baldwin Supp. 1997) ($85 filing fee); OKLA. STAT. tit. 26, § 5-112 (1997) ($750 filing fee); OR. REV. STAT. § 249.056(1)(b) (1991) ($100 filing fee); S.C. CODE ANN. § 7-13-40 (Law Co-op. Supp. 1996) (1% of annual salary); UTAH CODE ANN. § 20A-9-201(6)(a)(ii) (1995) (1/8 of 1% of salary; waived if indigent); WASH. REV. CODE § 29.15.050 (1993) (1% of annual salary); W. VA. CODE § 3-5-8(a) (1994) (1% of annual salary); WYO. STAT. ANN. § 22-5-208(a)(ii) (Michie 1997) ($200 filing fee); *cf.* N.H. REV. STAT. ANN. §§ 655:19 & 655:19-c. I(b) (1996) ($5000 filing fee, but reduced to $50 fee if candidate agrees to campaign spending limits).

[63] On October 10, 1997, President Clinton signed Public Law 105-55, the Legislative Branch Appropriations Act of 1998, which effectively granted to both House and Senate members a cost of living adjustment ("COLA") amounting to 2.3% of their annual salary. *See Pay Raise for Congress Tucked into Spending Bill*, RALEIGH NEWS & OBSERVER, Oct. 12, 1997, at A8. With this adjustment, the current salary for House members totals $136,672. *Id.* Because this COLA was built into the Ethics Reform Act of 1989, Pub. L. No. 101-194, § 704, 103 Stat. 1716, 1769, it required no congressional action in 1997. Instead, because Congress failed to expressly suspend the COLA (as it had done since 1993), the 1998 adjustment was automatic. *See generally* Boehner v. Anderson, 809 F. Supp. 138 (D.D.C. 1992), *aff'd*, 30 F.3d 156 (D.C. Cir. 1994) (discussing mechanics of COLA and deciding that it did not violate terms of the Twenty-seventh Amendment). Those states that express ballot access fees as a percentage of the House salary will therefore experience a proportionate increase.

[64] *See* ALASKA STAT. § 15.25.050(a) (Michie 1996) ($100); IDAHO CODE § 34-605(4) (Supp. 1997) ($300); MD. ANN. CODE art. 33, § 4A-6(c) (1997) ($100); MINN. STAT. ANN. § 204B.11(1)(a) (West Supp. 1997) ($300); MISS. CODE ANN. § 23-15-297(b) (1991) ($200); MO. REV. STAT. § 115.357.1(1) (1997) ($100); NEV. REV. STAT. ANN. § 293.193.1 (Michie 1995) ($300); OR. REV. STAT. § 249.056(1)(b) (1991) ($100); UTAH CODE ANN. § 20A-9-201(6)(a)(ii) (1995) (1/8 of 1% of congressional salary); WYO. STAT. ANN. § 22-5-208(a)(ii) (Michie 1997) ($200). Three states requiring both fees and signatures also require $500 or less. *See* HAW. REV. STAT. § 12-6(b)(1) (1993) ($75); KY. REV. STAT. ANN. § 118.255(1) (Michie 1993) ($500); OHIO REV. CODE ANN. § 3513.10(A) & (B)(1) (Banks-Baldwin Supp. 1997) ($85); *cf.* N.H. REV. STAT. ANN. §§ 655:19 & 655:19-c.I(b) (1996) ($5000 filing fee, but only $50 if candidate agrees to spending limits).

[65] Two others, Arkansas and Alabama, authorize parties to charge more than this amount, but do not require any fee whatsoever. *See* ALA. CODE § 17-16-15 (1995) (parties may assess fees not to exceed 2% of salary); ARK. CODE ANN. § 7-7-301 (Michie 1993)

Texas, Georgia, Virginia[66] and New Hampshire,[67] require more than 1%. Given that a clear consensus favors a maximum of 1% of the congressional salary, fees exceeding this amount ought to be seriously questioned. Chances are they are designed not to "winnow ballots," but are impermissibly focused on financing elections and raising revenue.

Florida is illustrative. Florida charged a $10,020 fee for access to its 1996 House primaries.[68] Clearly, this fee cannot credibly be claimed to offset the cost of placing candidates' names on primary ballots. The question, then, is why charge so much? The answer, in large part, lies in raising revenue to support various electoral projects, as well as the two major political parties.[69] In 1996, each $10,020 fee was divided like this: $1336 was deposited in an "Election Commission Trust Fund,"[70] $2004 was deposited in an "Election Campaign Financing Trust Fund,"[71] $3228.20 was placed in general

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(parties set their own fees; $3500 for Republicans and $5000 for Democrats in 1996). In the absence of state laws requiring that parties hold and finance primaries, *see, e.g.*, Republican Party of Ark. v. Faulkner County, 49 F.3d 1289 (8th Cir. 1995) (striking down Arkansas's funding scheme that allowed parties to set fees but required that they hold and fund primaries), allowing parties discretion to set fees would appear to present less serious constitutional problems. *But see* Smith v. Allwright, 321 U.S. 649 (1944) (holding that party primaries are subject to constitutional constraints because they involve a traditional state function).

[66] Virginia requires 2% of the congressional salary if a primary is held, but allows parties to use conventions instead. *See* VA. CODE ANN. §§ 24.2-523 & 24.2-521.2 (Michie 1993) (primary access requires 2% of annual salary plus signatures from ½ of 1% of voters in district); *id.* § 24.2-509(A) (parties may choose conventions). Major parties therefore often use conventions rather than primaries. Because of this, primary data from Virginia is sparse, *see, e.g.*, 1996 ELECTIONS REPORT, *supra* note 11, at 162, which has led me to exclude Virginia from the tables and computations conducted below. *See infra* notes 125-63 and accompanying text.

[67] New Hampshire charges $5000, but reduces the fee to $50 if the candidate agrees to campaign spending limits. *See* N.H. REV. STAT. ANN. §§ 655:19 & 655:19-c.I(b) (1996).

[68] Florida reduced its fee for congressional primaries from 7 and 1/2% to 6% of the congressional salary in 1997. *See* 1997 Fla. Sess. Law Serv. ch. 97-13, § 11 (West) (amending FLA. STAT. ANN. § 99.092(1) (West 1996)) (effective Jan. 1, 1998). The fee was accordingly reduced from $10,020 to $8016.

[69] Challenges to the disbursement of fee receipts have been uniformly rejected in Florida. *See* Boudreau v. Winchester, 642 So. 2d 1 (Fla. Dist. Ct. App. 1994); McNamee v. Smith, 647 So. 2d 162 (Fla. Dist. Ct. App. 1994). *But see* Butterworth v. Republican Party, 604 So. 2d 477 (Fla. 1992) (indicating possible merit in challenge to disbursements).

[70] *See* FLA. STAT. ANN. § 99.092(1) (West 1996) ("election assessment" of 1% of congressional salary goes to Election Commission Trust Fund).

[71] *See id.* § 99.092(1) (assessment of 1 and 1/2% of congressional salary goes to Election Campaign Financing Trust Fund).

revenue,[72] and the remaining $3406.80 was given to the candidate's party.[73] Although balances have varied, the Election Campaign Financing Trust Fund maintained a balance of over $2,000,000 in 1996.[74] The Election Commission Trust Fund held almost $900,000 in 1993.[75]

2. *Signatures*

Florida, of course, argues that its fee is motivated more by frivolous candidacies than raising revenue.[76] Any revenue generated by the fees is secondary, a bonus if you will. The money paid to the parties is not to placate them; it is merely a way of purchasing compliance with the state's regulation of the party's internal affairs. It may look to be at the expense of the candidate, but, after all, candidates do not *have* to pay the fee. They can use the signature alternative instead. It is all a matter of choice.

The problem with this rejoinder is that Florida has set its signature alternative high enough that few candidates can use it. Florida's alternative requires signatures from 3 percent of the total number of registered party voters in the candidate's district, a figure that averages almost four thousand signatures.[77] In 1992, 1994 and 1996, only one in four candidates in Florida qualified under this alternative.[78] From 1978 through the 1988 election,

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[72] *See id.* (2% of congressional salary is party assessment); *id.* § 99.103 (15% of remainder of 3% of congressional salary is deposited in general revenue).

[73] *See id.* § 99.103 (3% of congressional salary, less 15% of this figure, is given to party executive committee).

[74] Telephone Interview with Anne Serenti, Florida Department of State) (Apr. 23, 1997). The Fund was abolished in 1997 when the filing fee was reduced to 6% of the congressional salary. *See supra* note 68.

[75] Telephone Interview with Anne Serenti, *id.*

[76] Consider, however, Florida's explanation in *Green v. Mortham*, No. 96-1143-CIV-T-23A (M.D. Fla. filed June 12, 1996) (on file with author), that "a filing fee is an acceptable method of, among other things, assuring ballot integrity and defraying election-related costs," as well as its statutory finding that using filing fees to "public[ly] fund[ ] . . . political campaigns" does not infringe candidates' rights because of "a viable alternative to paying the filing fees." 1991 Fla. Laws ch. 91-107.

[77] *See* FLA. STAT. ANN. § 99.095(3) (West 1996) (requiring signatures from 3% of registered party members in district). The raw number of signatures varies depending on the party and the district. In 1996, the number of signatures varied between 1821 and 6894 for Democrats, and 799 and 5853 for Republicans. The mean number for all primaries in 1996 was 3908. (Data on file with author).

[78] In 1992, 1994 and 1996, 204 Republican and Democratic candidates ran in Florida's congressional primaries. *See* Affidavit of David A. Rancourt, Director, Division of Elections, Florida Department of State (Aug. 16, 1996) (filed in *Green v. Mortham*, No. 96-1143-CIV-T-23A (M.D. Fla. filed June 12, 1996)) (on file with author). One-hundred-forty-eight of

moreover, when Florida's filing fee was 5% of the congressional salary, *not one* candidate for either the Republican or Democratic congressional primaries qualified by using the signature alternative.[79] Almost 300 candidates qualified by paying the fee.[80] This did not change in 1990 when the fee was raised to 6% of the House salary, $5370 based on the prevailing congressional pay scale.[81] As in the previous six elections, the 45 candidates who qualified for Florida's congressional primaries in 1990 all paid the filing fee.[82] Only after the filing fee was raised to 7 and 1/2%, $9382.50, for the 1992 election[83] did candidates begin using the signature alternative. And then in 1997, perhaps because too many candidates turned to the signature alternative, Florida returned its fee to 6% of the congressional salary.[84]

Georgia's experience is similar. Georgia in 1996 required, on average, just over 2500 signatures.[85] Not one candidate qualified using this alternative in the 1996 Georgia primaries; all thirty-two candidates paid the $4008 fee.[86] Even Texas, which is unique among signature alternative states because it has set its signature requirement at a level well below its fee (500 signatures versus a $2500 fee), only eight of 112 candidates in 1996 used the alternative.[87]

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these candidates, almost 75%, paid the fee rather than collect signatures. *See id.*

[79] *See id.*

[80] *See* Memorandum from Connie A. Evans, Division of Elections, Florida Department of State, to George Waas, Florida Assistant Attorney General (Aug. 20, 1996) (filed in *Green v. Mortham*, No. 96-1143-CIV-T-23A (M.D. Fla. filed June 12, 1996)) (on file with author).

[81] The fee increase to 6% became effective on January 1, 1990. *See* 1989 Fla. Laws ch. 89-338, § 8 (effective Jan. 1, 1990). The House salary on July 1, 1989 was $89,500. *See* Exec. Order No. 12,663 (Schedule 6) (effective Jan. 6, 1989), 3 C.F.R. 199 (1990), *reprinted in* 5 U.S.C. § 5332 (1988). Florida relies on the congressional salary extant on July 1 of the year preceding the primary. *See* FLA. STAT. ANN. § 99.092(1) (West 1996).

[82] *See supra* note 78.

[83] The fee was increased to 7 and 1/2% on July 1, 1991. *See* 1991 Fla. Laws ch. 91-107, § 1 (effective July 1, 1991). The House salary also had jumped by this time to $125,100. *See* Exec. Order No. 12,736 (Schedule 6) (effective Jan. 1, 1991), 3 C.F.R. 316 (1991), *reprinted in* 5 U.S.C. § 5332 (Supp. II 1990). These changes combined to push Florida's filing fee to $9382.50.

[84] *See supra* note 68.

[85] *See* Letter from H. Jeff Lanier, Director, Georgia State Elections Division, to Mark R. Brown (July 23, 1996) (filed in *Green v. Mortham*, No. 96-1143-CIV-T-23A (M.D. Fla. filed June 12, 1996)) (on file with author).

[86] *See id.* ("I received your recent letter requesting the number of signatures that a pauper would need to file for ballot access in each of Georgia's congressional districts. We have not calculated that figure for all of the districts since it was not required by any candidate.").

[87] Telephone Interviews with Michael Jordan, Texas Republican Party, and Helen Moore, Texas Democratic Party (May 27, 1997).

One might argue that the relative affluence of candidates in states like Texas, Florida and Georgia makes it easier for them to pay their respective fees than collect signatures. "Serious" candidates obviously have money and find it easier to pay fees. That no one uses an alternative does not prove that it is unreasonable. It only shows that candidates choose not to use it. In some states, moreover, like Georgia[88] and Florida (prior to 1992),[89] signature alternatives are limited to those candidates who cannot afford the fee. Hence, serious candidates with money, those who likely could collect the requisite number of signatures, cannot use it. It is not surprising, the argument goes, that no one in Georgia in 1996 and no one in Florida prior to 1992 used the alternative.

Two responses are in order. First, signature drives present an expedient way to reach voters. All else being equal, a signature alternative ought to be the preferred choice; it is cheap advertising. Second, it is doubtful that money is no object to all serious candidates. True, many incumbents and ardent challengers spend hundreds of thousands of dollars on their campaigns.[90] Fees for them are a mere pittance. Many candidates, however, would gladly use a signature alternative if it saved thousands of dollars in fees. Their failure to do so in states, like Texas, that do not require indigency in order to make use of signature alternatives evinces the relative difficulty of collecting hundreds of signatures. Florida, moreover, repealed its indigency requirement for the 1992 election. Eighty candidates registered to qualify by collecting signatures that year,[91] but only nineteen successfully collected the requisite number of

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[88] Georgia requires that a candidate using the signature alternative "shall under oath affirm his or her poverty and his or her resulting inability to pay the qualifying fee otherwise required." GA. CODE ANN. § 21-2-132(f) (1993). Some states, like Delaware, require more than a mere inability to pay the fee. Delaware goes so far as to require that the prospective "indigent" candidate be "receiving benefits under the Supplemental Security Income Program for Aged, Blind and Disabled under Subchapter XVI of Chapter 7 of Title 42 of the United States Code," or meet the "resources tests for such benefits under 42 U.S.C § 1382(a), as applied to Delaware residents." DEL. CODE ANN. tit. 15, § 3103(e) (Supp. 1996).

[89] Prior to the 1992 elections, Florida required that a candidate using the signature alternative "file an oath . . . stating that he is unable to pay the qualifying fee . . . without imposing an undue burden on his personal resources or on resources otherwise available to him." FLA. STAT. ANN. § 99.095(1) (West 1990). This requirement was eliminated after the 1990 election. *See* 1990 Fla. Laws ch. 90-315 (redacting oath requirement).

[90] *See* Raskin & Bonifaz, *supra* note 1, at 1174–75 ("A winning campaign for the U.S. House of Representatives in 1992 cost, on average, $543,000, and the average rose to $730,000 in what can be deemed close races. Forty-three House candidates each spent more than $1 million on his or her campaign in 1992.").

[91] *See* DIVISION OF ELECTIONS, FLORIDA DEP'T OF STATE, REPORT ON 1992 PETITION CANDIDATES (filed in *Green v. Mortham*, No. 96-1143-CIV-T-23A (M.D. Fla. filed June 12, 1996)) [hereinafter REPORT ON 1992 PETITION CANDIDATES] (on file with author). In order to

signatures.[92] Measured against Florida's total number of primary candidates in 1992, 1994 and 1996, moreover, only 27% qualified using the alternative.[93] This is surprising when one considers that Florida's fee from 1992 through 1996 ranged between $9000 and $10,000.

The lesson is that collecting hundreds or thousands of signatures, usually in a short period of time[94] and under tedious restrictions,[95] is a difficult chore, even for experienced candidates. Large signature alternatives force candidates to choose fees, regardless of the dollar amount. Where a vast majority of candidates elect to pay thousands of dollars in fees rather than collect signatures, the reasonableness of the alternative must be questioned. It is disingenuous to argue that an unused, unrealistic and unreasonable alternative somehow saves an excessive fee.[96] Statements like that found in *Andress v.*

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use the signature alternative in Florida, one must first register with the proper election authorities. *See* FLA. STAT. ANN. § 99.095 (West 1996). That statute states:

> A person using this petitioning process shall file an oath with the officer before whom the candidate would qualify for the office stating that he or she intends to qualify by this alternative method for the office sought . . . . No signatures shall be obtained by a candidate on any nominating petition until the candidate has filed the oath required in this section.

It is for this reason that data from Florida is even available. Texas, for example, does not gather information on candidates who unsuccessfully make use of the signature alternative. *See* Telephone Interview with Michael Jordan, *supra* note 87.

[92] *See* REPORT ON 1992 PETITION CANDIDATES, *supra* note 91.

[93] *See supra* note 78 and accompanying text.

[94] In Florida, as is true in most states, signatures must be collected over the course of a specified period of time, usually three or four months, immediately preceding the primary. *See* FLA. STAT. ANN. § 99.095(1) (West 1996) (stating that signatures may be collected following "the first Tuesday after the first Monday in January of the year in which the first primary is held" and "prior to the 21st day preceding the first day of the qualifying period for the office sought"); *id.* § 99.061(1) (qualifying period described in § 99.095(1) begins "the 120th day prior to the first primary"). In 1996, for example, Florida's deadline for filing signatures was April 15.

[95] In Texas, for instance, the statutory rules regulating signature collection specify in detail what the collector must say to the prospective signatory. *See* TEX. ELEC. CODE ANN. § 141.064 (West 1986). Texas also limits a signatory to endorsing only one candidate. *See id.* § 141.066.

[96] The Supreme Court speculated in *Lubin* that states could constitutionally require a "substantial" number of signatures. *See* Lubin v. Panish, 415 U.S. 709, 718-19 (1974). In the few cases where the Court has considered the validity of signature requirements, it has routinely sustained numbers that reach into the thousands. In *Jenness v. Fortson*, 403 U.S. 431 (1971), among others, the Court upheld a Georgia law which required signatures from

Reed, where in the context of Senatorial ballot access the court opined that "certainly the requirement that [the prospective candidate] collect 10,000 signatures within approximately forty-five days is reasonable and constitutionally adequate,"[97] are remarkable for how far they stray from reality.

Even in those states that require fewer signatures and have smaller fees, the raw number of signatures required is uniformly set at[98] or well above[99] the raw

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five percent of the electorate in order to gain access to the general election ballot. *Jenness*, however, is not controlling. The *Jenness* line of cases dealt with the permissible number of signatures for minor parties' and independent candidates' access to general election ballots. The Supreme Court sustained the five percent requirement in *Jenness* because it found that requiring signatures leveled the playing field between major party candidates, who were forced into primaries, and independents and minor party candidates, who were not. The Court surmised that because winning a primary is at least as difficult as obtaining signatures from five percent of the electorate, everyone was treated roughly the same. *See id.* at 440–41; *see also* Libertarian Party of Fla. v. Florida, 710 F.2d 790 (11th Cir. 1983) (sustaining requirement that party obtain signatures from three percent of the electorate in order to qualify for general election ballot). Because primaries are screening mechanisms for general elections, gaining access to the former should not require the same modicum of support as does participating in the latter. Primary candidates, moreover, cannot be expected to have the resources of a minor party. Courts should therefore be hesitant to rely on cases like *Jenness* to support signature requirements for primaries. Although signatures may be constitutionally required for primaries, their permissible scope has yet to be determined. All agree that signature alternatives can be burdensome. *See* Rockefeller v. Powers, 917 F. Supp. 155, 159 (E.D.N.Y.), *aff'd*, 78 F.2d 44 (2d Cir. 1996) ("While *Lubin* dealt with ballot access that was impermissibly burdened by filing fees, it is clear that signature and other requirements may likewise impermissibly burden voter choice.").

[97] 880 F.2d 239, 242 (9th Cir. 1989). *Andress* erred by comparing signature requirements for primaries, which apply to candidates, to signature requirements for general elections, which apply to parties. Large signature requirements for the latter have been sustained by the Supreme Court. *See, e.g.*, Jenness v. Fortson, 403 U.S. 431 (1971). Parties, of course, have more resources than a lone candidate. Moreover, the state's interest in limiting the general election ballot is greater than limiting primaries. If nothing else, the state has an interest in requiring that a minor party candidate, or even an independent candidate, overcome roughly the same hurdles as a major party candidate who has survived a political primary.

[98] Only one state, Washington, sets the numbers at the same level. *See* WASH. REV. CODE § 29.15.050 (1993) ($1336 fee versus 1336 signatures).

[99] Of the eighteen states that use both fees and signature alternatives, thirteen set the raw number of signatures at a level above the raw dollar figure of the fee. *See* CAL. ELEC. CODE §§ 8106(2) & 8106(a)(2) (West Supp. 1996) ($1336 fee versus 3000 signatures); DEL. CODE ANN. tit. 15, §§ 3103(b) & 3103(d) (Supp. 1996) (party sets fee not to exceed $1336 versus 3828 signatures in 1996); HAW. REV. STAT. §§ 12-6(b)(1) & 12-6(e) (1993) ($75 filing fee for House plus 25 signatures versus alternative of between 1191 and 1253 signatures in 1996); IDAHO CODE §§ 34-605(3) & (4) (Supp. 1997) ($300 fee versus 500 signatures); KAN. STAT.

dollar figure of the fee. Given the commercial cost of collecting signatures, which commonly varies between $0.85 and $2.00 per signature,[100] fees have understandably proven to be the more efficient method of gaining ballot access.

This does not mean that signatures cannot provide a viable ballot access mechanism. The keys are reasonableness and symmetry, setting the number at a realistic level that does not stray too far from the fee. Remember that a substantial number of states forego fees altogether in favor of signatures,[101]

ANN. §§ 25-205(e)(2) & 25-206(a) (1993) ($1336 fee versus between 1707 and 1995 signatures in 1996); LA. REV. STAT. ANN. §§ 18:464.B(1) & C, & 18:465.C(3)(b) (West Supp. 1997) ($900 total fee versus 1000 signatures); MINN. STAT. ANN. §§ 204B.11(1)(a) & 204B.11(2)(b) (West Supp. 1997) ($300 fee versus 1000 signatures); MO. REV. STAT. §§ 115.357.1(1) & 115.357.3 (1997) ($100 fee versus between 1530 and 2303 signatures in 1996); MONT. CODE ANN. §§ 13-10-202(3) & 13-10-203(2)(b) (Supp. 1995) ($1336 fee versus 8569 signatures in 1996); N.C. GEN. STAT. §§ 163-107(a) & 163-107-1(c) (1995) ($1336 fee versus signatures from 10% of registered party members); OHIO REV. CODE ANN. 3513.10(A) & (B) (Banks-Baldwin Supp. 1997) ($85 filing fee); OKLA. STAT. tit. 26, § 5-112 (1997) ($750 fee versus between 6853 and 12,440 signatures in 1996); OR. REV. STAT. § 249.056(1)(b) (Supp. 1996) ($100 fee versus 1000 signatures); W. VA. CODE § 3-5-8(a) (1994) ($1336 fee versus 5344 signatures). Only Texas, Florida, Georgia and New Hampshire set signature numbers below dollar figures, which given the high fees is understandable. *See* FLA. STAT. ANN. §§ 99.092(1) & 99.095(1) (West Supp. 1997) ($10,020 fee versus between 3000 and 5000 signatures in 1996); GA. CODE ANN. §§ 21-2-131(a)(2) & 21-132(g) (1981) ($4008 fee versus between 2661 and 2780 signatures in 1996); N.H. REV. STAT. ANN. §§ 655:19 & 655:19-c.III (1996) ($5000 fee versus 1000 signatures); TEX. ELEC. CODE ANN. §§ 172.024(a)(3) & 172.025(2)(B) (West Supp. 1997) ($2500 fee versus 500 signatures). Washington's signatures and fees are the same. *See* WASH. REV. CODE § 29.15.050 (1993) ($1336 fee versus 1336 signatures).

[100] *See* Affidavit of Richard Arnold, CEO of National Voter Outreach, a for-profit corporation that solicits signatures for political campaigns (Sept. 9, 1996) (filed in *Green v. Mortham*, No. 96-1143-CIV-T-23A (M.D. Fla. filed June 12, 1996) ("The normal charge for soliciting signatures for political campaigns is between $0.85 and $2.00 per signature.").

[101] *See* ARIZ. REV. STAT. ANN. § 16-322.A.2 (West 1996) (qualify by collecting signatures from ½ of 1% of registered party members residing in district); COLO. REV. STAT. § 1-4-801(2)(b) (1997) (must file 1000 signatures); 10 ILL. COMP. STAT. ANN. 5/7-10b (West Supp. 1997) (must file by submitting signatures from ½ of 1% of party members in district); IOWA CODE § 43.20.3 (1991) (must file signatures from 2% of voters from party who participated in last general election and not less than 1% of total vote of candidate's party in district in last election); ME. REV. STAT. ANN. tit. 21-A, § 335.5.C (West 1993) (must file 1000 signatures from voters in district); MASS. ANN. LAWS ch. 53, § 6 (Law. Co-op. 1990 & Supp. 1997) (must submit 2000 signatures from voters); MICH. COMP. LAWS § 168.133 (Supp. 1997) (must submit signatures from 1% of party voters for secretary of state in district in last election); N.J. STAT. ANN. § 19:23-8 (West 1989) (must file 200 signatures from party members in district who voted in last election); N.M. STAT. ANN. § 1-8-33 (Michie 1995) (in order to access pre-primary must submit signatures from 2% of party voters in district in last

which proves that signature requirements work. Unlike states which use signatures as the alternative,[102] furthermore, pure signature states tend to require substantially fewer signatures. Most states require 1000 or less.[103] Many states require 500 or less.[104] All but one state require less than 1500

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gubernatorial election); N.Y. ELEC. LAW § 6-136.2(g) (McKinney Supp. 1997) (must submit 1250 signatures from party members in district); N.D. CENT. CODE § 16.1-11-06 (1981) (must submit 300 signatures from qualified electors or otherwise obtain party endorsement); R.I. GEN. LAWS § 17-14-7(b) (1996) (must file 500 signatures from voters); S.D. CODIFIED LAWS § 12-6-7 (Michie 1995) (must file signatures from 1% of party voters who participated in last gubernatorial election in district); TENN. CODE ANN. § 2-5-101(b)(1) (Supp. 1996) (must submit 25 voter signatures); VT. STAT. ANN. tit. 17, § 2355(1) (1982) (must submit 500 signatures from voters in district); WIS. STAT. ANN. § 8.15(6)(b) (West 1996) (must submit 1000 signatures from voters within district).

[102] Several states in addition to Florida and Georgia require thousands of signatures in order to obtain alternative access to the ballot. *See* CAL. ELEC. CODE § 8106(a)(2) (West Supp. 1996) (3000 signatures, though receive pro rata discount on fee for portion of signatures collected); DEL. CODE ANN. tit. 15, § 3103(d) (Supp. 1996) (signatures from 1% of registered voters; totaled 3828 for 1996 primary); HAW. REV. STAT. § 12-6(e) (1993) (½ of 1% of registered voters; totaled between 1191 and 1253 for 1996 primary, depending on district); KAN. STAT. ANN. § 25-206(3)(2) (1993) (signatures from 2% of registered party members in district; totaled between 1707 and 1995 for 1996 primary, depending on district); MO. ANN. STAT. § 115.357.3 (West 1997) (signatures from 1% of voters in last election; totaled between 1530 and 2303 for 1996 primary); MONT. CODE ANN. § 13-10-203(2)(b) (Supp. 1995) (signatures from 5% of voters for winner in last general election; totaled 8569 for 1996 primary); N.C. GEN. STAT. § 163.107.1(c) (1995) (signatures from 10% of registered party members in district); WASH. REV. CODE § 29.15.050 (1993) (signatures from 1336 voters); W. VA. CODE § 3-5-8(a) (1994) (signatures from 5344 voters).

[103] *See* ARIZ. REV. STAT. ANN. § 16-322.A.2 (West 1996) (signatures from ½ of 1% of registered party members in district; totaled between 619 and 867 for 1996 primary, depending on district); COLO. REV. STAT. § 1-4-801(2)(b) (1997) (signatures from 1000 voters); 10 ILL. COMP. STAT. ANN. 5/7-10b (West Supp. 1997) (signatures from ½ of 1% of qualified party members in district; totaled between 476 and 1098 for 1996 primary, depending on district); IOWA CODE § 43.20.3 (1991) (signatures from 2% of voters in last general election in each of at least half of counties in district and not less than 1% of total vote of party in last election; totaled between 827 and 905 for 1996 primary, depending on district); ME. REV. STAT. ANN. tit. 21-A, § 335.5.C (West 1993) (signatures from 1000 voters); N.J. STAT. ANN. § 19:23-8 (West 1989) (signatures from 200 registered party members); N.D. CENT. CODE § 16.1-11-06 (1981) (signatures from 300 voters); PA. STAT. ANN. tit. 25, § 2872.1 (West 1994) (signatures from 1000 party members plus $150 filing fee); R.I. GEN. LAWS § 17-14-7(b) (Michie 1996) (signatures from 500 voters); TENN. CODE ANN. § 2-5-101(b)(1) (Supp. 1996) (signatures from 25 voters); VT. STAT. ANN. tit. 17, § 2355(1) (1982) (signatures from 500 voters in district); WIS. STAT. ANN. § 8.15(6)(b) (West 1996) (signatures from 1000 voters).

[104] *See* N.J. STAT. ANN. § 19:23-8 (West 1989) (signatures from 200 registered party

signatures.[105] The lone exception is Massachusetts, which requires 2000 signatures.[106]

Using these states as a guide, 1000 signatures appears to present a safe outer constitutional limit. A consensus of states have found this figure manageable, and it bears a striking symmetry to the consensus fee of $1336. Although experience teaches that most candidates would still pay the fee, the difficulty of raising this number of signatures appears roughly proportional to paying a $1336 fee. As a constitutional matter then, fees that exceed $1336 should be subjected to fairly serious constitutional scrutiny. Alternatives that exceed 1000 signatures should also be viewed suspiciously. In the absence of persuasive justifications, requirements beyond these extremes should be invalidated under the First and Fourteenth Amendments.

II. LOOKING BEYOND THE CONSTITUTION: A NORMATIVE ANALYSIS

Three overt justifications support ballot access requirements.[107] First and

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members); N.D. CENT. CODE § 16.1-11-06 (1981) (signatures from 300 voters); R.I. GEN. LAWS § 17-14-7(b) (1996) (signatures from 500 voters); TENN. CODE ANN. § 2-5-101(b)(1) (Supp. 1996) (signatures from 25 voters); VT. STAT. ANN. tit. 17, § 2355(1) (1982) (signatures from 500 voters in district).

[105] *See* MICH. COMP. LAWS. § 168.133 (Supp. 1997) (signatures from 1% of party voters in district for secretary of state in last election; totaled roughly 1200 for 1996 primary); N.M. STAT. ANN. § 1-8-33.B (Michie 1995) (signatures from 2% of party voters in district for governor in last election; totaled between 1000 and 1500 for 1996 pre-primary); N.Y. ELEC. LAW § 6-136.2(g) (McKinney Supp. 1997) (signatures from 1250 party members); S.D. CODIFIED LAWS § 12-6-7 (Michie 1995) (signatures from 1% of party voters in last gubernatorial election in district; totaled between 1263 and 1726 for 1996 primary depending on party).

[106] *See* MASS. ANN. LAWS ch. 53, § 6 (Law Co-op. 1990 & Supp. 1997) (signatures from 2000 voters). New Mexico requires a number of signatures equal to 2% of the party's voters in the district in the last gubernatorial election, which in 1996 totaled between 1000 and 1500 signatures, in order to gain access to the pre-primary ballot. *See supra* note 8 and accompanying text. Twice as many signatures are required of candidates who do not achieve significant support at the party's pre-primary convention, meaning that the number of signatures required could reach 3000. Still, because candidates can access the pre-primary ballot with less than 1500 signatures, and then can access the primary ballot with no additional signatures, New Mexico is accurately described, I think, as requiring no more than 1500 signatures.

[107] I am focusing on requirements beyond those imposed by Article I. *See* U.S. CONST. art. I, §§ 2 & 3. Article I's requirements are geared toward insuring maturity and community: one must be a certain age and live in a particular place for an established period of time. *See id.*

foremost, ballot access requirements filter out "frivolous" candidacies.[108] Second, they provide stability to the ballot and to the American political system. Without restrictions, the argument goes, primaries would turn into political free-for-alls and voters could not make sensible selections.[109] Lastly, fees fund elections.[110] Who better than candidates should pay for the electoral process?

A more subtle argument, and one not often freely conceded, is that ballot access limitations perpetuate incumbency. Of course, incumbency today is a controversial topic. Several states have recently passed term limit measures, both on the congressional[111] and local levels.[112] Although the former have proved unconstitutional,[113] their passage proves a general, gnawing suspicion that incumbents are not able to govern in their constituents' best interests.[114]

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[108] *See* Timmons v. Twin Cities Area New Party, 117 S. Ct. 1364, 1372 (1997) ("States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials."); Lubin v. Panish, 415 U.S. 709, 717 (1974) (stating that "[a] large filing fee may serve the legitimate function of keeping ballots manageable"); Bullock v. Carter, 405 U.S. 134, 145 (1972) (holding that a state may prohibit "frivolous or fraudulent candidacies").

[109] *See, e.g.*, Storer v. Brown, 415 U.S. 724, 732 (1974) (holding that the state has an interest in avoiding voter confusion, preventing an overly burdened political process, and insuring that winners receive a majority of the votes).

[110] *See, e.g.*, *Bullock*, 405 U.S. at 856 (state argues that fees "provide a means for financing such elections").

[111] Prior to *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995), twenty-two states passed congressional term limits. *See* Sullivan, *supra* note 2, at 846.

[112] *See, e.g.*, UTAH CODE ANN. § 20A-10-201 (1995) (term limits for state legislators).

[113] *See* U.S. Term Limits v. Thornton, 514 U.S. 779 (1995). Term limits for state and local offices should present no momentous federal constitutional concerns. *See, e.g.*, League of Women Voters of Me. v. Diamond, 82 F.3d 546 (1st Cir. 1996) (affirming denial of preliminary injunction barring enforcement of state term limit law).

[114] *See, e.g.*, GEORGE F. WILL, RESTORATION: CONGRESS, TERM LIMITS AND THE RECOVERY OF DELIBERATIVE DEMOCRACY 182 (1992) ("The unhealthy tendency that today requires constitutional correction is the distortion of government and the demotion of Congress in the regime. That distortion and that demotion have been produced by legislative careerism predicated on constant abuse of the power of the purse."). *But see* Nelson W. Polsby, *Restoration Comedy*, 102 YALE L.J. 1515, 1523 (1993) (reviewing WILL) ("[E]ntrance to and exit from Congress are two points at which members are especially vulnerable to interest group influence; therefore, the more entering and exiting, the more outside influence. Term limits are intended to promote more entering and exiting, and therefore, if this analysis is correct, would worsen the very conditions of which Will complains."). *See generally* Elizabeth Garrett, *Term Limitations and the Myth of the Citizen-Legislator*, 81 CORNELL L. REV. 623, 630 (1996) ("Term limits activists hope to rid Congress of the politician because they believe that such a lawmaker inevitably acts in ways that are contrary to the public interest.").

Still, one must concede that some level of incumbency is desirable, if for no other reason than it provides a measure of stability to government.[115] Few serious political scientists would argue that constant and complete turnover ought to occur in a collective governing body.[116] Placing procedural hurdles in the path of potential candidates appears to be a logical way to protect incumbents.

On the other side, three basic values counsel against ballot restrictions. First, self-realization and self-determination are premised on individual and communal participation in the political process. Although widely expressed in terms of the individual's right to speak[117] and vote,[118] self-realization must also be understood to include running for office. How better to advance one's self-interest than to gain direct participation in government? Running for office, then, is quintessential political speech. The political community, meanwhile, has a right to self-determination, which necessarily must include, at some level, choices among candidates.[119] The community might choose an incumbent, or it might prefer a challenger. But electoral choice is certainly a valuable commodity.

A second, related value lies in the competitive political market. Political competition promotes truth in the ideal sense and fosters true representative government. Representatives are responsive, in large part, because of future elections.[120] Political competition, or at least its threat, encourages accountability in our republican system. Even unsuccessful competition is

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[115] Incumbency also promotes expertise. *See* Polsby, *supra* note 114, at 1523 ("It should come as no surprise at all that experience on the job helps liberals and conservatives alike do their jobs better.").

[116] If it were otherwise, Representatives would be restricted to a single term. No state passed such a restrictive term limit. Most allowed six terms. *See* Garrett, *supra* note 114, at 697 n.11. That not all Senators are up for re-election at the same time, moreover, demonstrates the Framers found some level of continuity important. *See* U.S. CONST. art. I, § 3 (providing for three classes of Senators, a class being vacated every two years).

[117] *See, e.g.*, MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 4–5 (1984) ("[A]ll forms of purely communicative activity serve the same ultimate value—what I label 'self-realization.'"); THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 6 (1970) (speech advances "individual self-fulfillment").

[118] *See, e.g.*, ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 55 (1960).

[119] *See, e.g.*, Morse v. Republican Party of Va., 116 S. Ct. 1186, 1198 (1996) ("Rules concerning candidacy requirements and qualifications, we have held, [have the] potential to 'undermine the effectiveness of voters who wish to elect particular candidates.'") (quoting Allen v. State Bd. of Elections, 393 U.S. 544, 570 (1969)).

[120] *See, e.g.*, Polsby, *supra* note 114, at 1523 ("The argument I am pressing simply says that the newer the member, the more dependent he or she is on the interest groups that helped elect him or her in the first place.").

important because it aborts complacency and fosters better government. Challengers, therefore, should be encouraged both to provide greater choice and for competition's own sake.

Finally, ballot restrictions, especially monetary ones, impact people and groups in different ways.[121] Fairness demands that all citizens have an equal opportunity to participate in communal decisions. To the extent that ballot access restrictions allow some, but not others, to run for office, they may cause debilitating inequities.[122] The American commitment to equality and the democratic ideal counsel against class-based barriers to participation in government.[123]

It is impossible to perfectly accommodate all of these values. While the Supreme Court has eliminated electoral funding as a permissible objective,[124] clashes and contradictions remain. Restrictions that screen frivolous candidates, mitigate voter confusion and advance political stability, for example, also tend to discourage serious candidates, dilute voter participation and interfere with an ideally democratic political process. Incumbency likewise promotes stability, but some would say at a high cost of stagnancy and governmental malaise.[125]

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[121] *See generally* Loffredo, *supra* note 56, at 1287 ("[W]ealth-induced distortions of the democratic process . . . systematically disadvantage and disenfranchise the poor as a group . . . .").

[122] *See* Raskin & Bonifaz, *supra* note 1, at 1161 ("[I]n the American wealth primary, large costs discourage candidacies by poor and working people and favor candidacies by the wealthy and by incumbents . . . .").

[123] *See* Raskin & Bonifaz, *supra* note 20, at 287 ("[N]either wealth nor poverty may be used to block meaningful participation by a group of citizens in the electoral process.").

[124] In *Bullock v. Carter*, 405 U.S. 134, 147–48 (1972), the Court stated:

> We . . . reject the theory that since the candidates are availing themselves of the primary machinery, it is appropriate that they pay that share of the cost that they have occasioned. . . .
>
> . . . [A] primary system designed to give the voters some influence at the nominating stage should spread the cost among all of the voters in an attempt to distribute the influence without regard to wealth.

[125] Political analyst George Will has commented:

> Members of Congress . . . have come to be seen as examples of people corrupted by being insulated from competition and accountability, people committed to nothing much other than their own continuation in office, people whose hold on their offices depends on their manipulation of the power of their offices and the resources to which their offices give them access.

WILL, *supra* note 114, at 40–41.

Like it or not, the same age-old dilemma that forces society to choose somewhere between anarchy and order allows only an optimal approach to ballot access. On balance, where should lines be drawn?

A. *Comparing Chaos and Choice: Data from the States*

Promising answers lie in the myriad experiments conducted across the United States every two years. As discussed in the previous section, ballot access laws vary from state to state. In an effort to understand how restrictions affect access, I have catalogued primary states[126] according to shared or common ballot access restrictions. Tables 1 and 2 collect ballot access data from the 1994 and 1996 congressional elections.[127] Table 1 separates those states using fees, at least as an alternative,[128] into four groups: those charging

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126 "Primary states" are those that require major parties to conduct elections in order to identify their respective candidates antecedent to general elections for congressional office. This includes forty-seven states. I have omitted Connecticut, Utah and Virginia from all tabulations because they do not mandate primaries. Connecticut and Utah condition primaries on pre-primary conventions, which act to screen out potential candidates. *See* 1996 ELECTIONS REPORT, *supra* note 11, at 90–91 (describing Connecticut's system); *id.* at 160 ("A candidate who receives more than 70% of the party convention vote [in Utah] is the nominee. If no candidate achieves that majority, a primary election is held between the two candidates receiving the highest number of votes."). Virginia allows the parties to choose either elections or conventions. *See id.* at 162 ("Parties may choose to nominate by convention or primary election."). Because the screening effect in Connecticut and Utah distorts the number of candidates who run in the primaries, and because data from Virginia indicates that primaries are seldom used, all three are excluded. I have chosen to include New Mexico, which also uses pre-primary conventions, *see supra* note 8, because candidates can still gain access to primaries by collecting additional signatures. *See id.*

127 Unless otherwise indicated, relevant fee and signature requirements did not change for the 1994 and 1996 election cycles. Of course, where the signature requirement is expressed as a percentage of registered voters, the raw numbers required might have changed in particular states. For purposes of this study, I have assumed that such changes are *de minimus* and therefore have ignored them in creating categories. Idaho changed its ballot access requirements between the 1994 and 1996 elections. In 1994, a candidate had to pay a $150 fee and supply 500 signatures. In 1996, a candidate could either pay a $300 fee or supply 500 signatures. *See* 1996 Idaho Sess. Laws ch. 28, §§ 2 & 22 (addressing change). New Mexico raised the number of additional signatures required to gain access to the primary ballot in 1994 from 3% of the party's voters in the district in the last gubernatorial election to 4% in 1996. *See* 1995 N.M. Adv. Legis. Serv. ch. 124, § 16. Unless otherwise indicated, all tabulations are distilled from FEDERAL ELECTION COMM'N REPORT, FEDERAL ELECTIONS 94: ELECTION RESULTS FOR THE U.S. SENATE AND THE U.S. HOUSE OF REPRESENTATIVES (1995) [hereinafter "1994 ELECTIONS REPORT"], and the 1996 ELECTIONS REPORT, *supra* note 11.

128 Hawaii, Ohio and Pennsylvania, which require both fees and signatures, *see supra*

more than $1336;[129] those charging $1336 or less but more than $500;[130] those charging $500 or less but more than $100;[131] and those charging $100 or less.[132]

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note 11, are treated as signature states. In all three of these states, signature collection is more onerous than paying the fees, justifying their treatment as signature states. Kentucky, meanwhile, which requires a $500 fee supported by two signatures, *see supra* note 11, is treated as a fee state. Idaho required both a $150 fee and 500 signatures in 1994. *See supra* note 127. In 1996, however, Idaho alternatively required either a $300 fee or 500 signatures. *See id.* For sake of consistency, Idaho is treated as if it alternatively required a $300 fee for both the 1994 and 1996 elections. I recognize that Idaho's 1994 signature requirement likely predominated over its fee, and therefore Idaho, like Hawaii, Ohio and Pennsylvania, could logically be treated as a signature state for the 1994 election cycle. Rather than divide Idaho between two different categories, however, I have chosen to include its two 1994 House seats in the same fee category as its two 1996 House seats.

[129] Five states are included in this category: Alabama, Arkansas, Florida, Georgia and Texas. *See supra* notes 13, 58 & 65. Alabama and Arkansas are included because fees assessed by the parties fall into this range. In Alabama, both parties in 1996 assessed fees equal to 2% of the congressional salary. In Arkansas, the Democratic party charged $5000 in 1996, while the Republican party charged $3500. New Hampshire, which charges $5000 but reduces its fee to $50 if the candidate agrees to campaign spending limitations, *see supra* note 67, is excluded from all tabulations. Uncertainty surrounding whether candidates in New Hampshire qualified by paying $5000 or $50 makes it difficult to say with any confidence that New Hampshire should be catalogued as either charging more than $1336 or less than $100.

[130] Eleven states fall into this category: California, Delaware, Kansas, Louisiana, Montana, Nebraska, North Carolina, Oklahoma, South Carolina, Washington and West Virginia. *See supra* notes 12, 14, 58 & 62. Delaware allows parties to assess fees up to 1% of the congressional salary. *See supra* note 62. In 1996, both parties assessed the full amount.

[131] Six states fall into this category: Idaho, Kentucky, Minnesota, Mississippi, Nevada and Wyoming. *See supra* notes 12–14.

[132] Five states fall into this category: Alaska, Indiana, Maryland, Missouri and Oregon. *See supra* notes 12–15 & 58. As a worst case scenario, I have included Indiana in this category. Indiana charges neither a fee nor requires signatures. *See supra* note 15. Because Indiana's figures do not differ significantly from those for Alaska, Maryland, Missouri and Oregon, they have neither substantially inflated nor deflated the totals. Thirty-five of forty primaries conducted in 1994 and 1996 were contested in Indiana, half with three or more candidates. Indiana's candidate per primary ratio was just over three-and-one-third to one. *See* 1994 ELECTIONS REPORT, *supra* note 127, at 64–67; 1996 ELECTIONS REPORT, *supra* note 11, at 101–04.

TABLE 1					
FEE	PRIMARIES	CANDIDATES	CONTESTS	CONTESTS WITH 3 OR MORE	CANDIDATES PER PRIMARY
>$1336	300	467	106 (0.35)	48 (0.16)	1.56
≤$1336 > $500	416	725	169 (0.41)	78 (0.19)	1.74
≤ $500 > $100	96	175	35 (0.36)	21 (0.22)	1.82
≤ $100	132	438	106 (0.80)	68 (0.52)	3.31

Table 2 divides states using only signatures into three groups: those that require at least 1000 signatures;[133] those that require more than 100 signatures but less than 1000;[134] and those that require 100 or less.[135]

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[133] Nine states fall into this category: Colorado, Maine, Massachusetts, Michigan, New Mexico, New York, Pennsylvania, South Dakota and Wisconsin. *See supra* note 11. New Mexico's change in the percentage of signatures required between 1994 and 1996, *see supra* note 127, did not change the category in which it is listed. Whether one focuses on the number of signatures needed to access pre-primary conventions or primaries in New Mexico, the number exceeds 1000 and New Mexico's category remains the same. *See supra* note 106.

[134] Seven states fall into this category: Arizona, Illinois, Iowa, New Jersey, North Dakota, Rhode Island and Vermont. *See supra* note 11. I included Illinois notwithstanding the fact that in 1996 two of forty primaries required more than 1000 signatures. *See* ILLINOIS STATE BD. OF ELECTIONS, 1996 SIGNATURE REQUIREMENTS—U.S. CONGRESS (on file with author). The Democratic primaries for District 1 and District 2 required 1098 and 1002 signatures, respectively. *See id.* The mean number of signatures in Illinois for 1996 was below 600 signatures per primary. *See id.*

[135] Four states are in this category: Tennessee, Hawaii, Ohio and Indiana. *See supra* notes 11 and 15. Hawaii is unique in that it has a signature alternative to its signature requirement. *See* HAW. REV. STAT. § 12-6(e) (1985) (signatures from ½ of 1% of voters in district; totaled between 1191 and 1253 in 1996). I have disregarded this alternative in favor of the petition requirement of 25 signatures, which is coupled with a filing fee of $75. *See* HAW. REV. STAT. §§ 12-5(a) & 12-6(b)(1) (1985). Because Hawaii's fee is so low, moreover, I have treated it as a signature state. *See supra* note 128. One will note that Indiana is also included in the tabulation for states charging $100 or less. *See supra* note 132. I have included Indiana in the signature tabulation as a worst case scenario. Indiana is the only state that has been included in two separate tabulations. Because these two tabulations are not compared against each other, this redundancy causes no difficulties.

TABLE 2					
SIGNATURES	PRIMARIES	CANDIDATES	CONTESTS	CONTESTS WITH 3 OR MORE	CANDIDATES PER PRIMARY
≥ 1000	396	594	119 (0.30)	48 (0.12)	1.50
< 1000 > 100	192	350	85 (0.44)	40 (0.21)	1.82
≤ 100	160	395	98 (0.61)	51 (0.32)	2.47

The data contained in Tables 1 and 2 includes the total number of primaries studied, the total number of candidates who ran in these primaries, the number and percentage of contested primaries, the number and percentage of primaries with three or more candidates, and the ratio of candidates to each primary. The ratio of candidates to primaries is material to whether access restrictions deter frivolous candidacies and how well they serve this goal. If, for example, the candidate per primary ratio in states with relatively open ballots is large, the argument in favor of deterrence would appear more credible. From the other side, the percentage of contested elections is relevant to self-determination, self-realization and the spirit of competition. If percentages are high regardless of the restrictions imposed, it would be hard to argue that restrictions interfere with these goals.[136]

Looking first to the signature states described in Table 2, those eight states that require 1000 or more signatures collectively had less than one-third (30%) of their 1994 and 1996 primaries contested. Only about one in ten (12%) of these primaries had three or more candidates. On average, one and one-half candidates ran in each primary, meaning that only three major-party candidates ran for each congressional seat.[137] Primary ballots in states requiring between 100 and 1000 signatures had more candidates and larger percentages of contested primaries. Close to half (44%) of the primaries in these seven states were contested in 1994 and 1996, one-fifth (21%) with three or more candidates. Almost two candidates (1.82), on average, ran in each primary.

The percentage of contested primaries and the candidate per primary ratio increased again with those states requiring 100 or fewer signatures. More than

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[136] *Cf.* Raskin & Bonifaz, *supra* note 1, at 1161 ("[I]n the American wealth primary, large costs discourage candidacies by poor and working people . . . ; private money becomes crucial . . . [which] ends up reducing competition, participation, and dialogue.").

[137] Comparing this data to that for states using fees, one learns that requiring one-thousand-plus signatures appears about as restrictive as requiring fees that surpass $2500. *See* Table 1. States like Alabama, Arkansas, Florida, Georgia and Texas, which use fees between $2500 and $10,020, have similar percentages and ratios.

half (61%) of the primaries were contested, a third (32%) with three or more candidates. Just under two-and-one-half candidates (2.47) ran in each primary. A definite trend therefore emerges: more signatures correlates with fewer contests and candidates.

Fee states experienced a similar inverse relation between the size of restrictions and the volume of candidates and contests. As with signature states, increased restrictions caused declines in candidate participation. Only about one-third (35%) of the 1994 and 1996 primaries were contested in the five states charging fees exceeding $1336. Roughly half of these contested primaries (16% overall) had three or more candidates. The ratio of candidates to primaries, meanwhile, was just more than one-and-one-half (1.56) to one. Those states that charged between $500 and $1336, meanwhile, had primaries contested 41% of the time, with almost one in five having three or more candidates. Close to one and three-quarters (1.74) candidates, on average, ran in each primary.

The candidate per primary ratio increased to 1.82 for the seven states charging between $100 and $500. Though neither this increase, nor the slight drop in contested elections, is alone significant, it reflects a continuing trend toward increased candidate participation. Indeed, in states charging $100 or less, the number of candidates running in each primary increased to almost three-and-one-third (3.31). The percentage of contested elections jumped dramatically to 80%. More than half of the primaries (52%) had three or more candidates.

One learns from this data that both monetary restrictions and signature support requirements are effective. In Indiana, for example, the only state to charge no fee and impose no support requirement, the candidate per primary ratio for the combined 1994 and 1996 elections was just over three-and-one-third to one.[138] While this average was obviously not reduced by fees ranging up to $100—Alaska, Maryland, Missouri and Oregon produced a similar combined average—it was reduced precipitously by fees exceeding $100, as well as virtually any signature requirement. Charging fees between $100 and $500 brings the ratio down to just under two candidates per primary, while requiring up to 100 signatures brings down the average to just under two-and-one-half candidates per primary.

Increasing fees and signature support requirements beyond these thresholds, however, appears to achieve no appreciable advantage, at least if the concern is limiting the number of candidates on primary ballots to manageable levels. A five-fold increase in fees from $500 to $2500 caused participation rates to drop only one-quarter candidate per primary, from just under two (1.82) to just over one-and-one-half (1.56) candidates in each

[138] *See supra* note 132.

primary. Because one would hope to have two candidates on each ballot anyway, multiplying fees several times proves counterproductive. In terms of discouraging frivolous candidacies, maintaining order, and minimizing voter confusion, fees beyond $500 are both unnecessary and unduly stifling.

Even for those states that charge nominal fees of $100 or less, the ratio of candidates to primaries is still only three-and-one-third (3.31) to one.[139] It is difficult to understand how three or four candidates in any given primary causes voter confusion or otherwise disrupts the political process. True, the likelihood of runoffs is increased, at least if majority votes are required to win.[140] Half of the primaries in jurisdictions charging $100 or less had three or more candidates, compared to less than a quarter in the remaining fee states. The problem with runoff elections, however, seems overstated. In 1994, less than one-quarter of the primaries in the states charging $100 or less would have been forced into runoffs by majority vote requirements.[141] Better yet, runoff elections can be avoided in other ways, such as by relaxing the need for majority votes or by running "blanket" or "open" primaries.[142] In short,

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[139] Because the percentage of contested primaries is large, 80%, this figure is spread fairly evenly among primaries. *See* Table 1. It is not that one primary has ten candidates and three others are uncontested. Instead, the more common model would have two primaries with four candidates apiece, one primary with three candidates, and one primary with two candidates.

[140] For states requiring 100 or fewer signatures this is not even an issue, since the candidate to primary ratio is only 2.47 to one, and only 32% of the primaries had three or more candidates. *See* Table 2. These numbers are not that different from those in states requiring between 100 and 1000 signatures. *See id.*

[141] In only 15 of 66 primaries did the winning candidate fail to receive a simple majority. No runoffs were held in any of these states, however, because either majorities were obtained in the primaries, *see* 1994 ELECTIONS REPORT, *supra* note 127, at 32 (Alaska), or a majority was not required. *See id.* at 64–67, 73–75, 87–89 & 113–14 (Indiana, Maryland, Missouri and Oregon).

[142] In a "blanket" primary system, candidates from all parties run together in the same primary; those with the most votes, regardless of party affiliation, then qualify for the general election. *See* 1996 ELECTIONS REPORT, *supra* note 11, at 74, 107 (describing Alaska's and Louisiana's systems). In an "open" primary, like that in Louisiana, "all candidates, regardless of party affiliation, appear on the same ballot and all voters regardless of party affiliation may vote for the candidate of their choice." Love v. Foster, 90 F.3d 1026, 1030 (5th Cir. 1996), *cert. granted*, 117 S. Ct. 1243 (1997). Should a candidate receive a majority of the vote in the open primary, that candidate wins the election. If not, those two candidates with the most votes square off in the general election. *See id.* Post-general election runoffs are unnecessary. So long as open or blanket primaries are timed properly, they pose no federal difficulties. *See* Love v. Foster, 100 F.3d 413, 414 (5th Cir. 1996) (per curiam) (denying rehearing) ("[W]e do not suggest that Louisiana may not retain its open primary system. One way it can retain this system and avoid any conflict with the federal statute is to hold the open primary on

charging fees in excess of $100 appears to be a lot of medicine for a minor, and avoidable, difficulty.[143]

Perhaps more importantly, dramatic increases in fees and signature requirements cause the percentage of primaries contested to drop significantly.[144] Eighty percent of the primaries were contested in states

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Federal Election Day and provide for a runoff election between November and January when the elected member of Congress takes office."); *cf.* Martin Dyckman, *Preserve the Primary Runoff Election*, ST. PETERSBURG TIMES, July 29, 1997, at 9A (arguing that if runoffs are abolished, then "preference voting" should be adopted, where "voters would mark their second choices at the same time they cast their first votes, rather than four weeks later. Election computers would add second-choice votes to declare a winner when no one has a majority of first-choice votes.").

[143] In those states charging more than $1336 in 1994, only 7% of the primaries resulted, or would have resulted (assuming a majority vote requirement), in runoffs. *See* 1994 ELECTIONS REPORT, *supra* note 127, at 31–32, 34–35, 52–58 & 126–32 (reporting election results for Alabama, Arkansas, Florida, Georgia and Texas). One must therefore concede that a $2500 filing fee better avoids runoffs than a $100 fee. Still, one need not concede that the cost (fewer choices) is justified by the gain (fewer runoffs). Whether a $100 fee or a $2500 fee, the percentage of runoffs is still relatively low—less than 25%.

[144] I use "significantly" as a statistical term of art. The term is used in conjunction with a statistical "z-test," which allows one to assess the likelihood that two samples were randomly drawn from the same population. The analysis assumes that repeated samplings of a given population will produce a normal distribution of data for that population. *See* WILLIAM MENDENHALL & RICHARD L. SCHEAFFER, MATHEMATICAL STATISTICS WITH APPLICATIONS 325–38 (1973). Sampled data can then be tested against expected results to determine the likelihood that the samples were selected naturally or randomly. *See* Castaneda v. Partida, 430 U.S. 482, 496 n.17 (1977) (describing the binomial distribution and relevance of standard deviations); Hazelwood Sch. Dist. v. United States, 433 U.S. 299, 308 n.14 (1977). In short, a statistical z-test uses a z-score, which is calculated by dividing the difference between the two samples' percentages by the expected standard deviations for the samples, to identify a p-value. *See generally* HERMAN J. LOETHER & DONALD G. MCTAVISH, DESCRIPTIVE AND INFERENTIAL STATISTICS: AN INTRODUCTION 145–50 (4th ed. 1993). P-values are found using a standard conversion table found in most statistics text books. *See id.* at 150. A p-value basically stands for the likelihood that the two samples came from the same population. Where the p-value is very low, say, less than 0.05 (5%), one is ordinarily comfortable concluding that they did not. The differences between the samples are said to be statistically "significant." Note that there is no magic to the 5% level. Although most sociologists use it, others would require a greater degree of confidence. *See* Kingsley R. Browne, *Statistical Proof of Discrimination: Beyond "Damned Lies"*, 68 WASH. L. REV. 477, 486 (1993); D.H. Kaye, *Is Proof of Statistical Significance Relevant?*, 61 WASH. L. REV. 1333, 1342–45 (1986). Where it is unknown which of the sampled percentages is to be larger, p-values are calculated using a two-tailed analysis. A one-tailed analysis tests only whether a sample is higher or lower than observed data, but not both. A two-tailed test, on the other hand, analyzes whether samples are different, either being higher than the other. *See* MENDENHALL

charging $100 or less. Sixty-one percent of the primaries were contested in states requiring 100 or fewer signatures. Only about one-third (35%) of the primaries, meanwhile, were contested in those states charging more than $1336—a difference that is statistically significant when compared with states charging $100 or less.[145] Less than one-third (30%) were contested in states requiring 1000 or more signatures—again a statistically significant difference when contrasted with states requiring 100 or fewer signatures.[146] Rather than maintaining order by minimizing frivolous candidacies, large fees and signature requirements primarily eliminate choice. The one candidate eliminated from each primary by extreme fees does not reduce the ballot from four to three or even three to two; its principal effect, instead, is more akin to reducing the ballot from two candidates to one.

Quite understandably, voter turnout suffers when choice is limited. This truth is obvious for the primaries themselves, since uncontested elections either produce no turnout[147] or minimal voter interest.[148] It also translates, however, to general elections, where states with the largest fees and signature requirements, and lowest ratios of candidates-to-primaries,[149] also have the smallest general election voter turnouts. In the 1996 general House elections, for example, those five states charging more than $1336 had a composite voter turnout of only 41% of their voting age populations.[150] Those states charging

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& SCHEAFER, *supra*, at 336–37; LOETHER & MCTAVISH, *supra*, at 150. For purposes of this Article, a two-tailed analysis has been used, and I have used p-values of 0.05 and less to identify "significance." Z-scores equal to or greater than 1.96 generate p-values of 0.05 and less using a two-tailed analysis and are thus considered significant. *See* LOETHER & MCTAVISH, *supra*, at 150.

[145] When compared with states charging $100 or less, the z-score is 10.16, well beyond the 1.96 needed to establish significance. *See supra* note 144.

[146] When compared against states requiring 100 or fewer signatures, the z-score is 6.95, again well beyond the needed 1.96. *See supra* note 144.

[147] Many states, like Florida, do not require primaries where candidates run unopposed. The unopposed candidate proceeds directly to the general election. *See, e.g.*, 1996 ELECTIONS REPORT, *supra* note 11, at 92–95 (describing Florida's primary returns).

[148] In Arizona, for example, unopposed candidates are required to run in the primary, where voter participation is much smaller than that found in the general election. *See* 1996 ELECTIONS REPORT, *supra* note 11, at 75–76. In Arizona's Third District in 1996, where both major party candidates ran unopposed, the total turnout was only 75,895 voters, versus 263,445 in the ensuing general election. *See id.*

[149] *See* Tables 1 and 2.

[150] Unless otherwise indicated, turnouts are based on voters participating in the November 5, 1996 general election for the U.S. House of Representatives. Alabama, Arkansas, Florida, Georgia and Texas cumulatively had 14,411,568 voters participate in this election. *See* 1996 ELECTIONS REPORT, *supra* note 11, at 74, 76, 95, 96 & 155. Together, their voting age population totaled 35,151,000 in 1996. *See* Federal Elections Comm'n, *Voter*

$100 or less, in contrast, had a voter turnout of almost 51%.[151] Granted, numerous variables undoubtedly factor into these differences, and I do not pretend to offer anything close to what is necessary to properly study the phenomenon. Still, one cannot ignore the fact that voters are more likely to participate when given a choice among candidates. Popular ballots produce more choice, which in turn leads to more voters in both primary and general elections.

B. *The Effect of Restrictions on Incumbency*

Naturally, the beneficiaries of uncontested primaries are incumbents. One might make a guarded argument that restrictive ballots are necessary to perpetuate a measure of incumbency and stability in government. Tables 3 and 4 chart incumbency success rates in the 1994 and 1996 general congressional elections by identifying the number of available seats, the number of

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Registration and Turnout—1996 (http://www.fec.gov/pages/96to.htm) [hereinafter "*Voter Registration and Turnout—1996*"]. The cumulative number of registered voters in these five states in 1996 totaled 26,270,064. *See id.* Measured against the number of registered voters, the percentage of votes cast in 1996 was 55%.

[151] Alaska, Indiana, Maryland, Missouri and Oregon together cast 7,632,692 votes in the 1996 House general elections. *See* 1996 ELECTIONS REPORT, *supra* note 11, at 74, 104, 111, 122 & 144. The voting age population in these five states numbered 15,025,000 in 1996. *See Voter Registration and Turnout—1996*, *supra* note 150. Measured against the number of registered voters, which was 11,795,885 in these states in 1996, *see id.*, the voter turnout was 65%. The difference in voter turnouts between states requiring 1000 or more signatures and those requiring 100 or less is not as pronounced. States in the former category had a collective turnout of 48%, measured against voting age population, while states in the latter category had a collective turnout of 49% when measured against voting age population. States requiring 1000 or more signatures, Colorado, Maine, Massachusetts, Michigan, New Mexico, New York, Pennsylvania and South Dakota, had a composite voter turnout of 21,059,262, *see* 1996 ELECTIONS REPORT, *supra* note 11, at 90, 108, 113, 117, 129, 136, 148 & 150, almost half of their collective voting age population of 43,872,000. *See Voter Registration and Turnout—1996*, *supra* note 150. States requiring 100 or fewer signatures, Hawaii, Indiana, Ohio, Tennessee and Wisconsin, had a composite turnout of 8,624,194 voters, *see* 1996 ELECTIONS REPORT, *supra* note 11, at 97, 104, 142, 152 & 166, again almost half of their collective voting age population of 17,646,000. *See Voter Registration and Turnout—1996*, *supra* note 150. Measured against registered voters, the difference between respective percentages is larger. States requiring 1000 or more signatures had a collective turnout of 60% (18,908,935 actual voters divided by 31,763,035 registered voters) (excluding Wisconsin whose figures were unavailable). *See id.* States requiring 100 or fewer signatures had a 63% turnout (8,624,194 actual voters divided by 13,762,601 registered voters). *See* 1996 ELECTIONS REPORT, *supra* note 11; *Voter Registration and Turnout—1996*, *supra* note 150.

incumbents running, the number of incumbents opposed in their parties' primaries, and the number of incumbents winning in general elections. Using the same categories found in Tables 1 and 2, Tables 3 and 4 proffer evidence that while popular ballot access correlates with reduced incumbency, it does not threaten wholesale turnover in Congress.

TABLE 3

FEES	SEATS	INCUMBENTS RUNNING	INCUMBENTS WINNING GENERAL ELECTION	OPPOSED IN PRIMARY	% WINNING	% OPPOSED	% RUNNING	% INCUMBENTS TO SEATS
> $1336	150	126	124	22	98	17	84	83
≤ $1336 > $500	208	184	165	54	90	29	88	79
≤ $500 > $100	48	39	35	8	90	21	81	73
≤ $100	66	55	51	38	93	69	83	77

Turning first to Table 3, in states charging more than $1336 incumbents won 98% of the general elections in which they ran. For states charging $1336 or less, incumbency success rates dropped to between 90% and 93%. The composite of all fee states charging $1336 or less produces an incumbency success rate of 90%,[152] which though high is still significantly less than 98%.[153] The overall percentage of incumbents to seats, meanwhile, dropped from 83% for states charging more than $1336 to 79% for those charging between $500 and $1336. For states charging $500 or less,[154] only 75% of the seats were won by incumbents.[155] While the rate running for re-election was roughly the same regardless of ballot restrictions, 84% in states charging more

[152] This is based on an accumulation of the totals for states charging between $1336 and $500, between $500 and $100, and $100 or less. In this composite, incumbents won 251 of 278 elections in which they ran, or 90%. *See* Table 3.

[153] Comparing the 90% success rate in states charging $1336 or less against the winning percentage for incumbents in states charging more than $1336, 98%, the z-score is 3.88, which is statistically significant. *See supra* note 144.

[154] Combining the last two categories of states charging between $100 and $500, and states charging $100 or less. *See* Table 3.

[155] This percentage is based on 114 seats (48 in states charging $500 or less but more than $100 and 66 in states charging $100 or less) and 86 successful incumbents (35 in states charging $500 or less but more than $100 and 51 in states charging $100 or less). *See* Table 3.

than $1336 versus 86% in those states charging less than $1336,[156] incumbents were challenged in primaries more than twice as often in states charging $1336 or less.[157]

TABLE 4

SIGNATURES	SEATS	INCUMBENTS RUNNING	INCUMBENTS WINNING GENERAL ELECTION	OPPOSED IN PRIMARY	% WINNING	% OPPOSED	% RUNNING	% INCUMBENTS TO SEATS
≥ 1000	198	182	171	46	94	25	92	86
< 1000 > 100	96	79	73	27	92	34	82	76
≤ 100	80	71	64	34	90	48	89	80

Table 4 presents a similar picture for signature states, though for perhaps different reasons. The success rate for incumbents dropped from a high of 94% in states requiring at least 1000 signatures to a low of 90% in states requiring 100 or fewer signatures. The percentage of seats occupied by incumbents, moreover, fell from 86% in states requiring 1000 or more signatures to 78% for those states requiring less,[158] a statistically significant difference.[159] While the drop in incumbency might be expected given incumbents' reduced success rate in states with more open access, it seems to correlate more closely with the percentage of incumbents seeking re-election, which sank from a high of 92% in states requiring more than 1000 signatures to 85% in those states requiring fewer signatures.[160] The difference in incumbency running rates is statistically

[156] This figure is a composite of those for three categories of states charging less than $1336. *See* Table 3. In these combined states, 278 incumbents ran for 322 seats.

[157] Incumbents were challenged 17% of the time in states charging more than $1336. *See* Table 3. In states charging $1336 or less, incumbents were challenged 43% of the time. The latter percentage is based on 278 incumbents running (184 in states charging between $1336 and $500, 39 in states charging $500 or less but more than $100, and 55 in states charging $100 or less) with 119 being opposed (29 in states charging between $1336 and $500, 21 in states charging $500 or less but more than $100, and 69 in states charging $100 or less). *See* Table 3.

[158] This figure results from combining those states requiring 100 or fewer signatures with those requiring between 100 and 1000. *See* Table 4. In this composite, 176 seats were won by 137 incumbents, 73 of 96 in states requiring between 100 and 1000 signatures and 64 of 80 in states requiring 100 or fewer signatures.

[159] The z-score is 2.15, which is statistically significant. *See supra* note 144.

[160] This figure is a result of combining states requiring between 100 and 1000 signatures with those requiring 100 or less. *See* Table 4. In this composite, 150 of 176 incumbents ran again, 79 of 96 in states requiring between 100 and 1000 signatures and 71 of 80 in states

significant.[161]

Even recognizing the importance of continuity in American government, one is hard-pressed to argue that an incumbency success rate hovering around 90% is perilously low.[162] The fact is that incumbents win, and win often, whether fees are set at $100, $500 or $10,000. Incumbents hardly need the protection offered by restrictive access fees and signature requirements. On the other hand, a credible argument can be made that an incumbency success rate closely approaching 100% is too high.[163] Accountability is, in large part, premised on a possibility of removal. As it now stands in many states with extreme qualification requirements, one's risk of removal is *de minimus*. Anything that moderates a 100% success rate ought to be embraced as a plus for truly representative (and accountable) government.

C. *Empirical Coda*

Measured against the data contained in Tables 1 and 2, deterrence cannot be considered a sound reason for imposing filing fees beyond the $500 level. Candidate participation rates from the 1994 and 1996 primary elections indicate that $500 filing fees have approximately the same deterrent value as fees in excess of $1336.[164] Likewise, requiring more than 1000 signatures achieves little more than requiring 100 signatures in terms of winnowing the ballot.[165]

Rather than deterring a plethora of potentially frivolous candidates, the over-regulation found in most states unduly restricts choice. Competition, self-realization and self-determination are all premised on choice. Restrictions that cause fewer than two candidates, on average, to run, and which cause a preponderance of primaries to be uncontested, are inconsistent with all of these values. Additionally, large fee and signature requirements tend to alienate less-affluent candidates from the ballot. It is for these reasons that fees optimally should not exceed $100[166] and support requirements should not exceed 100

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requiring 100 or fewer signatures.

[161] The z-score is 2.04, which is statistically significant. *See supra* note 144.

[162] George Will has noted that "in the entire history of the House of Representatives the success rate for incumbents seeking re-election has rarely fallen below 70 percent. Indeed, it has been lower in only seven of the 102 elections: 1842, 1854, 1862, 1874, 1890, 1894 and 1932." WILL, *supra* note 114, at 77. Moreover, "in the twenty-one elections from 1950 through 1990 the rate has exceeded 90 percent seventeen times and has never fallen below the 86.6 rate of 1964." *Id.*

[163] *See id.* (arguing that incumbency success rates are too high in the House of Representatives).

[164] *See* Table 1.

[165] *See* Table 2.

[166] *See* Table 1.

signatures.[167] Restrictions at or below these levels allow maximal competition while at the same time still achieving a significant deterrent effect.

Elections are expensive, of course, and fees raise money, not insignificant concerns in austere times. As a normative matter, however, I agree with the Supreme Court that socializing the cost of elections over a large tax base is preferable to forcing user fees on candidates.[168] Large fees send the wrong message; rather than reinforce the electorate's already negative perception of the political process, the better approach is to absorb costs and maintain free and open elections. Fees are useful to other ends, but there are better methods to replenish the public fisc.

Any lingering fears over precipitous declines in success rates of incumbents ought to be assuaged by the figures contained in Tables 3 and 4. Incumbents will not unduly suffer at the hands of popular ballots. They may be at greater risk of losing future elections, but that, it would seem, is the price of democracy. Indeed, given incumbents' recent success rates, greater risk ought to be considered a societal good. After all, something is to be said for fresh faces and perspectives in government. In any event, far from forcing a complete turnover in the House, relaxed access requirements ought to simply infuse greater accountability in government.

III. CONCLUSION

Needed ballot access reform can be implemented in any one of three ways. First, courts can make use of the First and Fourteenth Amendments to strike down those restrictions exceeding $1336 and 2000 signatures. Second, state legislatures might act to reduce their access requirements to the optimal levels urged here. Third, Congress could pass legislation that sets the permissible outer contours for access to federal ballots across the nation.

None of these presents any momentous constitutional concerns. At least since *Marbury v. Madison*,[169] courts have been defining constitutional rights. States, meanwhile, are delegated the authority to regulate the "Times, Places and Manner of holding Elections for Senators and Representatives" by Article I, section 4 of the Federal Constitution.[170] This same grant, in turn, affords to Congress the power to "at any time by Law make or alter such Regulations."[171] It is obvious that both the states[172] and Congress can regulate

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[167] *See* Table 2. This figure is on the edge, since it results in only 2.47 candidates per primary and 61% of the primary elections being contested.

[168] *See* Bullock v. Carter, 405 U.S. 134, 147–49 (1972).

[169] 5 U.S. (1 Cranch) 137 (1803).

[170] U.S. CONST. art. I, § 4.

[171] *Id.*

ballot access for federal elections.[173]

Because judicial control is plodding and cumbersome—and likely to produce only marginally satisfactory results—legislation is preferred. The policy question is whether local control, and local autonomy, ought to trump a nationally set standard which encourages uniformity in federal elections. The preferred approach, I believe, is for Congress to set permissible parameters for primary ballot access across the United States. States should not be allowed to exceed set dollar and signature figures, though they should be provided the option of requiring less. The relevant maxima should approximate $100[174] and 100 signatures, with the states retaining authority to choose a singular signature approach. Should a state opt for a fee, of course, a signature alternative (or waiver for indigency) would be required. State restrictions exceeding stated amounts would be pre-empted as inconsistent with federal standards.[175]

Only one-fifth of the states currently abide by the normative

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[172] States that are covered by § 5 of the Voting Rights Act presumably will be forced to preclear changes to their filing fees with the Attorney General. *See* Morse v. Republican Party of Va., 116 S. Ct. 1186 (1996) (holding that a party's imposition of a delegate fee is subject to preclearance); Dougherty County Bd. of Educ. v. White, 439 U.S. 32, 40 (1978) (holding that the board's rule requiring that candidates take unpaid leaves of absence are, like filing fees, subject to the preclearance requirement of section 5) (citing U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER 134–37 (1975)). So long as a state decreases its fees and signature alternatives, one, I think, can safely assume that preclearance would be forthcoming.

[173] *See* Oregon v. Mitchell, 400 U.S. 112, 123 (1970) ("In short, the Constitution allotted to the States the power to make laws regarding national elections, but provided that if Congress became dissatisfied with the state laws, Congress could alter them."). The Qualifications Clause of Article I might present an obstacle to both congressional and state regulation of ballot access, but would only prove relevant if regulation became so burdensome as to amount to an additional qualification. *U.S. Term Limits v. Thornton*, 514 U.S. 779 (1995), and *Powell v. McCormack*, 395 U.S. 486 (1969), have interpreted Article I to prevent the states and Congress from imposing qualifications other than age, citizenship and residence. However, because even the most draconian of restrictions imposed by the state have yet to be deemed impermissible qualifications, it is unlikely that any serious challenge can be made to the relaxed restrictions proposed here.

[174] Rather than a stated dollar amount, Congress might understandably choose a percentage of the congressional salary. One-tenth of one percent, which amounts to $133.60 under the 1996 schedule, is a close approximation.

[175] In order to avoid Tenth Amendment concerns, Congress should simply set these standards and pre-empt state regulations to the contrary. Ordering states to set specified standards would likely run afoul of federalism concerns. *See* Printz v. United States, 117 S. Ct. 2365 (1997) (holding that the federal government cannot force local law enforcement officials to conduct background checks for arms sales); New York v. United States, 505 U.S. 144 (1992) (holding that the federal government cannot force state to take title to waste).

recommendations pressed in this Article. Hence, the changes urged here might seem a bit drastic to some. Remember, however, that many today advance much more draconian revisions to the electoral landscape. Term limits, campaign finance reform—these are serious changes. Compared to these changes, the suggestions urged here are mere tinkerings—tinkerings that might make a difference nonetheless.